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1358

No.

4071

United States
Circuit Court of Appeals
For the Ninth Circuit.

CLARENCE E. LEWIS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

FILED

AUG 4 - 1923

F. D. MONGKTON,
CLERK.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CLARENCE E. LEWIS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

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the Southern District of California,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

UNITED STATES,)

Plaintiff and respondent,)

-vs-

) CITATION ON APPEAL
CLARENCE E. LEWIS,)

Defendant and appellant.)

UNITED STATES OF AMERICA—SS

THE PRESIDENT OF THE UNITED STATES
STATES, to JOSEPH C. BURKE, Esq., United
States Attorney in and for the Southern District of
California, Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Appeals,
for the Ninth Circuit, to be holden at the City of San
Francisco, in the State of California, within thirty
days from the date hereof, pursuant to an order allow-
ing an appeal of record in the clerk's office of the
United States District Court for the Southern District
of California, Southern Division, wherein Clarence E.
Lewis is appellant, and you are appellee, to show cause,
if any there be, why the decree rendered against the
said appellant, as in the said order allowing appeal
mentioned, should not be corrected, and why speedy
justice should not be done to the parties in that behalf.

WITNESS the Hon. Benjamin F. Bledsoe, United
States District Judge for the said District, this 9th
day of July, 1923.

Bledsoe

United States District Judge

[Endorsed]: No. 4253 Crim. IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION UNITED STATES, Plaintiff and respondent, -vs- CLARENCE E. LEWIS, Defendant and appellant. CITATION ON APPEAL Received cop of within this 9th day July 1923 Mack Meader Asst U. S. Atty Filed Jul 9 1923 at — min. past — o'clock —A M Chas. N. Williams, clerk L L Aronson deputy COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELORS 1011 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277 C L R Bk 8/163

No.———

Filed———

Viol: Harrison Narcotic Act of February 24, 1919 amending Act of December 17, 1914.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION.

At a stated term of said of said Court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Southern Division of the Southern District of California, on the second Monday of January in the year of our Lord one thousand nine hundred and twenty-two:

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the Division and District aforesaid, on their oaths present:

That CLARENCE E. LEWIS, whose full and true

name, other than as herein stated, is to the Grand Jurors unknown, late of the Southern Division of the Southern District of California heretofore, to-wit: on or about the 22nd day of April, A. D. 1922, at or near Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully and feloniously deal in and distribute certain narcotics, to-wit: one ounce of cocaine and two packages containing about one ounce of each morphine sulphate, without having registered and paid the special tax as required and imposed by Section One of an Act of Congress approved February 24, 1919 amending an Act of Congress approved December 17, 1914, and known as the Harrison Narcotic Act; and the said CLARENCE LEWIS was then and there a person required to register and pay the special tax under and by the above said Act and (1) Section One thereof, that is to say the said cocaine and morphine sulphate as aforesaid were not then and there contained in the original stamped packages having affixed thereto and bearing thereon appropriate tax paid stamps as required by the said Harrison Narcotic Act, and the said cocaine was then and there a compound, manufacture, salt derivative and preparation of coca leaves, and the said morphine sulphate was then and there a compound, manufacture, salt, derivative and preparation of opium;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. (2)

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That CLARENCE E. LEWIS, whose full and true name, other than as herein stated, is to the Grand Jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 22nd day of April, A. D. 1922, at or near Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully and feloniously sell, barter, exchange or give away a certain derivative of coca leaves and a certain derivative of opium, to-wit: one ounce of cocaine and two packages containing about one ounce each of morphine sulphate, not in pursuance of a written order issued in blank for that purpose by the Commissioner of Internal Revenue; and the said defendant was then and there a person required to register and pay the special tax by and under Section One of an Act of Congress approved February 24, 1919, amending an Act of Congress approved December 17, 1914, known as the Harrison Narcotic Act.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Joseph C. Burke
United States Attorney

Mark L. Herron

Assistant United States Attorney.

NO. 4253 CRIM
UNITED STATES DISTRICT COURT,
Southern District of California
SOUTHERN DIVISION.
THE UNITED STATES OF AMERICA

vs.

CLARENCE E. LEWIS.

INDICTMENT

Viol: Harrison Narcotic Act
of Feb. 24, 1919 amending
Act of Dec. 17, 1914

A true bill,

Chas. M. Stone

Foreman

Filed

June 2 1922

CHAS. N. WILLIAMS, Clerk

By Douglas Van Dyke

Deputy Clerk

Bail \$5,000

At a stated term, to wit, the January A. D. 1922
Term of the District Court of the United States,
within and for the Southern Division of the
Southern District of California, held at the court
room thereof, in the city of Los Angeles, on
Monday the 19th day of June in the year of
our Lord one thousand nine hundred and twenty
two.

PRESENT: THE HONORABLE BENJAMIN F.
BLEDSOE, DISTRICT JUDGE.

United States Of America, Plaintiff)	
vs.	)	No. 4253
Clarence E. Lewis,	Defendant	)Crim. S. D.

This cause coming on for the entry of plea of defendant Clarence E. Lewis; Mack Meader, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; defendant being present in court with his attorney Warren L. Williams, Esq., and having been required to plead, thereupon interposes his plea of NOT GUILTY, and good cause appearing therefor, it is now by the court ordered that this cause be continued to the July Term for setting for trial.

At a stated term, to wit, the January A. D. 1922 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the City of Los Angeles, on Monday the 5th day of June, in the year of our Lord one thousand nine hundred and twenty two.

PRESENT: THE HONORABLE BENJAMIN F. BLEDSOE, DISTRICT JUDGE.

United States of America, Plaintiff)	
vs.	)	No. 4253
Clarence E. Lewis,	Defendant	)Crim. S. D.

This cause coming on at this time for arraignment and plea of defendant Clarence E. Lewis; Mack Meader, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; defendant being present in court with his attorney S. S. Silverton, Esq., and defendant having been arraigned and having waived the reading of the Indictment and stated his name to

be as therein stated; now, upon motion of counsel for the defendant, it is by the court ordered that this cause be continued to June 12th, 1922, for the entry of plea of defendant herein,

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

SOUTHERN DIVISION.

THE UNITED STATES	)	No. 4253 Criminal
OF AMERICA,)	
-vs-	)	Plaintiff,
CLARENCE E. LEWIS,	)	REQUEST FOR
Defendant.	)	INSTRUCTIONS

The defendant, CLARENCE E. LEWIS, in the above entitled matter hereby requests the court to instruct the Jury by giving to the Jury each and every one of the instructions attached hereto and marked Numbers 1 to —, inclusive.

DATED: February —, 1923.

Attorney for Defendant.

In considering the evidence if you can reasonably account for any fact in this case on a theory or hypothesis which will admit of defendant's innocence, it is your duty under the law to do so and to reject any theory or supposition on which it might point to his guilt, even though such theory may be reasonable and much more probable than the one which admits of his innocence.

DEFENDANT'S INSTRUCTION NO.
GIVEN:

Judge.

You are instructed that a conviction cannot be had on the testimony of an accomplice unless such accomplice is corroborated by other evidence which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense. And you are further instructed that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

DEFENDANT'S INSTRUCTION NO.
GIVEN:

Judge.

You are instructed that before you can convict the defendant in this case it must appear from the evidence beyond a reasonable doubt that the defendant and not somebody else, committed the crime charged in the information, if such offense was in fact committed. It is not sufficient that the evidence shows that the defendant or somebody else committed the crime, nor that the probabilities are that the defendant and not somebody else committed the crime, unless those probabilities are so strong as to remove all reasonable doubt as to whether the defendant or somebody else is the guilty party.

DEFENDANT'S INSTRUCTION NO.
GIVEN:

Judge.

You are instructed that testimony with regard to verbal statements should be received with great caution. This evidence, consisting, as it does, in the mere

repetition of oral statements, is subject to much imperfection and mistake, in consequence of the person speaking not having clearly expressed his or her meaning, or, in consequence of the witness having misunderstood him or her, as the case might be. It frequently happens also that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the person in fact did say. You are instructed that this kind of testimony should be scanned closely, and that it is to be received with caution.

DEFENDANT'S INSTRUCTION NO.
GIVEN:

Judge.

The law under which the defendant was indicted was designed first for purposes of Revenue and second to regulate the traffic in drugs; it was designed therefore, to do away with the unlawful purchasing, selling, distributing, dispensing and dealing in drugs and if you find that the defendant had the said drugs in his possession not for any of the aforesaid purposes, it is your duty to acquit him.

DEFENDANT'S INSTRUCTION NO.
GIVEN:

Judge.

In considering the weight and effect to be given to the evidence of the defendant, you may consider his manner and the probability of his statements taken in connection with all the evidence in the case; and in judging of the defendant who has testified before you

you are in duty bound to presume that he has spoken the truth ,and unless that presumption has been legally regutted, his evidence is entitled to full credit. If his testimony standing alone or taken in connection with other facts and circumstances in the case, raises a reasonable doubt in your minds as to his guilt, it will be your duty to act upon that doubt and acquit him.

DEFENDANT'S INSTRUCTION NO.

GIVEN:

Judge.

The Jury is advised to acquit the defendant, CLARENCE E. LEWIS.

DEFENDANT'S INSTRUCTION NO.

GIVEN:

Judge.

The Court charges you that if any witness has willfully sworn falsely as to any material matter, it is your duty to distrust the entire evidence of such witness.

DEFENDANT'S INSTRUCTION NO.

GIVEN:

Judge.

(Approved People vs. Stevens)

141 Cal. 488.

It is not your duty to look for some theory upon which to convict the defendant, but, on the contrary, it is your duty, and the law requires you, if you can reasonably do so, to reconcile any and all circumstances

that have been shown with the innocence of the defendant, and so acquit.

DEFENDANT'S INSTRUCTION NO.
GIVEN:

Judge.

You are instructed that in this case the law raises no presumption against the defendant, and the fact that he is charged with the crime alleged and that an indictment has been filed against him is no evidence of his guilt and should raise no presumption of such act in the minds of the jury, but every presumption of law is in favor of his innocence and in order to convict him with the crime charged in the indictment every material fact necessary to constitute such crime must be proved beyond reasonable doubt.

DEFENDANT'S INSTRUCTION NO.
GIVEN:

Judge.

The defendant in this case is presumed by law to be innocent of any crime until *guilt* of such crime and every essential element thereof is established beyond a reasonable doubt.

It is incumbent upon the prosecution to prove every material element of the offense charged beyond a reasonable doubt, and if you have such reasonable doubt as to whether they have proved or have failed to prove any one essential and material fact going to make up guilt, it is your sworn duty to acquit.

It is by law considered better that any number of guilty persons should escape than to adopt a course

under which an innocent person might be convicted because of an erroneous conclusion of court or jury.

Hence it is that a defendant cannot be convicted unless his guilt is established by more than a preponderance of evidence. It is not enough that you should believe in his guilt to such an extent that would make you willing to act in the ordinary affairs of life, even of the greatest importance. This will not do. Before you can find this defendant guilty, you must be satisfied of his guilt to a moral certainty and beyond a reasonable doubt.

DEFENDANT'S INSTRUCTION NO.
GIVEN:

Judge.

You are instructed that if the evidence introduced before you shows that the defendant was entrapped by Police Officers into the commission of the purported acts charged against him in this indictment, you are instructed that the testimony of all such officers and agents concerned in leading the defendant into crime is to be scanned by you with caution. The practice of entrapping persons into the commission of crimes by authorities has frequently been condemned by Courts and Juries alike, since human nature is frail enough at best, and requires no encouragement in wrong-doing. If you believe from the evidence that the said Police Officers took active steps to lead the accused into the commission of the purported acts and that without such encouragement or solicitation from the authorities he would not have committed or tried

to commit the acts charged, then in that event I instruct you to find him not guilty.

DEFENDANT'S INSTRUCTION NO.
GIVEN:

Judge.

No. 4253

Dept.—

In The
DISTRICT COURT OF THE U. S.
IN AND FOR THE
SO. DIST.
SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA

Plaintiff

vs.

CLARENCE E. LEWIS

Defendant.

INSTRUCTIONS TO JURY.

Filed

Feb 7, 1923

Chas. N. Williams, Clerk

Edmund L. Smith, Deputy.

Refused

Bledsoe J.

Warren L. Williams

419 Ferguson Bldg.

307 So. Hill Street

Los Angeles, Cal.

Bdwy. 7881

Bdwy. 7880

Attorneys for Defendant.

At a stated term, to wit: The January Term, A. D., 1923 of the District Court of the United States

of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of LOS ANGELES, on Wednesday the 7th day of February, in the year of Our Lord one thousand nine hundred and twenty-three Present:

The Honorable BENJAMIN F. BLEDSOE District Judge.

UNITED STATES OF AMERICA,)	
	Plaintiff,)
	vs	) No. 4253
Clarence E. Lewis,	Defendant	) Crim. S. D.

This cause coming on at this time for trial of defendant Clarence E. Lewis before this court and a jury to be impanelled herein; Mack Meader, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendant being present in court with his attorney W. L. Williams, Esq; Ross Reynolds being also present in his official capacity as stenographic reporter of the testimony and proceedings; and counsel for the respective parties having announced their readiness to proceed with the trial of this cause, it is by the court ordered that this cause be *proceed* with and that a jury be impanelled herein, and thereupon the following twelve names were drawn from the jury box, to wit:

Edward, N. T.; Welch, Edward T.; Whitley, Ross E.; Baeyertz, John T. F.; Cocker, Ed.; Weishaar, Rudolph G.; Levy, Isaac O., Reynolds, W. C.; Fitch, Henry W.; Thomas, Ray R.; Eberle, John W.; Esmay, Geo.; and said petit jurors having been called and sworn on void dire and passed for cause by the court

and by counsel for the respective parties; and
Ross E. Whitley having been peremptorily challenged
by counsel for the Government and by the court ex-
cused; and

N. T. Edwards having been peremptorily challenged
by counsel for the defendant and by the court ex-
cused; and

John T. F. Baeyertz having been peremptorily chal-
lenged by counsel for the defendant and by the court
excused;

Isaac O. Levy having been peremptorily challenged
by counsel for the plaintiff and by the court excused;

It is by the court ordered that four more petit jur-
ors' names be drawn from the jury box, said names
as drawn being as follows, to wit: Gifford, Harry
V.; Hunt, Henry B.; Green, Max L.; Curran, Chas.
P.; and said four petit jurors having been called and
sworn, on voir dire and passed for cause by the court
and by counsel for the respective parties; and

Henry B. Hunt having been peremptorily challenged
by counsel for the defendant and by the court ex-
cused;

It is by the court ordered that one more name be
drawn from the jury box, said name as drawn being
Wm. F. Gable, and said Wm. F. Gable having been
called and sworn on voir dire and passed for cause by
the court and by counsel for the respective parties; and

Counsel for the respective parties not having desired
to peremptorily challenge the petit jurors now in the
box, it is by the court ordered that said petit jurors
be sworn in a body as the jury to try this cause, said

petit jury as sworn consisting of the following named petit jurors, to wit:

THE JURY:

- | | |
|-------------------------|---------------------|
| 1. Wm. F. Gable, | 7. Chas. P. Curran, |
| 2. Edward T. Welch, | 8. W. C. Reynolds, |
| 3. Harry V. Gifford, | 9. Henry W. Fitch, |
| 4. Max L. Green, | 10. Ray R. Thomas, |
| 5. Ed Cocker, | 11. John W. Eberle |
| 6. Rudolph G. Weishaar, | 12. Geo. Esmay, |

Now, at the hour of 11:20 o'clock A. M. the court admonishes the jury that during the progress of this trial they are not to speak to anyone about this cause or any matter or thing therewith connected, and that until said cause is finally submitted to them for their deliberation under the instruction of the court they are not to speak to each other about this cause or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them, and declares a recess for ten minutes; and at the hour of 11:00 o'clock A. M. the court having reconvened and all being present as before; and

George Moffat and W. R. Wood having been respectively called and sworn, and having respectively testified on behalf of the Government; and

In connection with their testimony there having been offered for Identification and admitted for Identification by the court on behalf of the Government the following exhibits, to wit:

U. S. Ex. No. 1 for Identification—Package of drugs.

U. S. Ex. No. 2 for Identification—Bottle drugs.

U. S. Ex. No. 3 for Identification—Flat can drugs,

U. S. Ex. No. 4 for Identification—Square box
(pasteboard) drugs,

and there having been offered in evidence by the Government and admitted in evidence by the court the following exhibits, to wit:

U. S. Ex. No. 5—one tobacco tin can

U. S. Ex. No. 6—one tobacco tin can,
and there having been offered for Identification and admitted for Identification by the court on behalf of the Government the following exhibits, to wit:

U. S. Ex. No. 7 for Identification—Carton tea box,

U. S. Ex. No. 8 for Identification—Square box
(pasteboard) drugs,

U. S. Ex. No. 9 for Identification—Pipe tobacco tin
Tuxedo,
and

T. F. O'Brien having been called, sworn and having testified on behalf of the Government, and in connection with his testimony the court having ordered, on motion of counsel for the Government, that plaintiff's exhibits Nos. 2, 3, 4, 8, and 9, heretofore admitted for Identification, be admitted in evidence and said exhibits having thereupon been admitted in evidence and marked plaintiff's exhibits Nos. 2, 3, 4, 8, and 9 respectively; and

Said T. F. O'Brien having been cross-examined by W. L. Williams, Esq. counsel for the defendant, as aforesaid, and said witness having been examined by the court;

Now, at the hour of twelve o'clock P. M. the court gives to the jury herein the aforementioned admonition and declares a recess to the hour of two o'clock P. M. and

At the hour of two o'clock P. M. the court having reconvened and all being present as before,

It is by the court ordered that the jury in this cause be excused until a jury have been impanelled in cause No 4729 Crim. and

At the hour of 2:45 o'clock P. M. the jury in this cause having returned and all being present as before; and

T. J. Mailheau having been called, sworn and having testified on behalf of the Government; and

In connection with his testimony there having been offered in evidence by Mack Meader, Esq., Assistant United States Attorney and admitted in evidence by the court over the objection of said W. L. Williams, Esq. counsel for the defendant, the following exhibit on behalf of the Government, to wit:

U. S. Ex. No. 10—Opium pipe, and

Said T. J. Mailheau having been cross examined by said W. L. Williams, Esq. on behalf of the defendant; and

Lloyd R. Yarrow having been called, sworn and having testified on behalf of the Government and cross-examined by said W. L. Williams, Esq.; and

The Government having thereupon rested; and

The motion of defendant to dismiss this cause having been denied; and

Clarence E. Lewis having been called, sworn and

having testified in his own behalf, and cross-examined by said Mack Meader, Esq. on behalf of the Government; and

Anna Earley having been called, sworn and having testified on behalf of the defendant and cross-examined by said Mack Meader, Esq. and

Blanche Jones having been called, sworn and having testified on behalf of the defendant and cross-examined by said Mack Meader, Esq. on behalf of the Government; and

Wm. McKinley Dixon having been called, sworn and having testified on behalf of the defendant;

Now, at the hour of 3:30 o'clock P. M. the court gives to the jury herein the aforementioned admonition and declares a recess for ten minutes; and

At the hour of 3:40 o'clock P. M. the court having reconvened and all being present as before and the jury being present; and

Wm. M. Dixon having resumed the witness stand and testified for the defendant and

Geo. W. Dickerson having been called, sworn and having testified on behalf of the defendant; and

John Irvin having been called, sworn and having testified on behalf of the defendant; and

Defendant having thereupon rested; and

Mack Meader, Esq. having stated there is no rebuttal; and

At the hour of 4:50 o'clock P. M. said Mack Meader, Esq. having argued to the jury on behalf of the Government; and

At the hour of 4:55 o'clock P. M. said W. L. Wil-

liams, Esq. having argued on behalf of the defendant; and

At the hour of 4:00 o'clock P. M. said Mack Meader, Esq. having closed his argument on behalf of the Govednment in rebuttal; and

At the hour of 4:05 o'clock P. M. the court having instructed the jury herein with respect to the law involved in this cause; and

At the hour of 4:30 o'clock P. M. Bailiff Vincent Mangerina having been sworn to care for the jury herein during the deliberation of its verdict; and

Juror Thomas having asked for certain testimony of witness Mailheau, which the court has read to him; and

The Jury herein having thereupon retired to deliberate upon their verdict, and at the hour of 4:35 o'clock P. M. the court having declared a recess in this cause until the coming in of the jury in this cause; and

Now, at the hour of 4:45 o'clock P. M. the jury return into court and are asked through their Foreman J. W. Eberle if they have agreed upon a verdict and said jury having replied that they have so agreed, are required to present the same, said verdict as presented and read by the clerk of the court being as follows, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION. United States of America, Plaintiff vs. Clarence E. Lewis, Defendant No. 4253 Crim. S. D., WE, the Jury in the above entitled cause, find the defendant

guilty as charged in the first count of the Indictment and not guilty as charged in the second count of the Indictment. Los Angeles, California, February 7th, 1923. J. W. Eberle, Foreman.

and the verdict having been read as aforesaid and ordered filed and entered herein, it is by the court ordered that defendant be remanded to the custody of the United States Marshal and that this cause be continued to February 13th, 1923 at the hour of ten o'clock A. M. for sentence; and

On motion of said Mack Meader, Esq., it is by the court ordered that the exhibits herein be ordered withdrawn and delivered to the Narcotic Agent Wm. R. Wood, and it is further ordered by the court that the receipt for said Narcotics and the Instructions requested by the defendant, which were refused, be filed herein,

47/403

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

The United States of America, Plaintiff,)

vs.

) No. 4253

Clarence E. Lewis,

Defendant.) Crim. S. D.

We, the Jury in the above entitled cause, find the defendant Guilty as charged in the First Count of the Indictment, and Not Guilty as charged in the Second Count of the Indictment.

Los Angeles, California, February 7th, 1923.

J. W. Eberle

Foreman

Filed

Feb 7 1923

Chas. N. Williams, Clerk

Edmund L. Smith, deputy

UNITED STATES DISTRICT COURT, SOUTH-
ERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION,

THE UNITED STATES)	
OF AMERICA	)	No. 4253 Crim.
	)	MOTION IN AR-
Plaintiff	)	REST OF JUDG-
-vs-	)	MENT
CLARENCE E. LEWIS,)	
Defendant)	

Comes now the defendant CLARENCE E. LEWIS, in the above-entitled and numbered action and against whom a verdict of guilty was rendered in said cause on Wednesday, the 7th day of February, 1923, and moves the Court to arrest the judgment against him and hold for naught the verdict of guilty rendered against him, for the following reasons, to-wit:

That said indictment does not, nor does any count or paragraph thereof state facts sufficient to constitute a public offense.

Defendant therefore prays that this motion be sustained and that the judgment against him be arrested and held for naught, and that he have all such other orders as may be just and proper in the premises.

And he will forever pray.

Cooper Collings Shreve

Attorneys for defendant

No 4253 Crim.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

CLARENCE E. LEWIS

Defendant

MOTION IN ARREST OF
JUDGMENT

Filed

Feb 13 1923

Chas. N. Williams, Clerk
Edmund L. Smith, Deputy
Cooper, Collings & Shreve
Attorneys and Counselors
1011 Washington Bldg.

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UNITED STATES DISTRICT COURT, SOUTH-
ERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

THE UNITED STATES) No. 4253 Crim.
OF AMERICA,)

Plaintiff,) MOTION TO VA-

-vs-) CATE AND SET

CLARENCE E. LEWIS,) ASIDE VERDICT

Defendant.)

Comes now the defendant in the above entitled ac-
tion, and moves the court to vacate and set aside the

verdict heretofore rendered in this action, and grant him a new trial, upon the following grounds, to-wit:

I.

That the verdict is contrary to the law.

II.

That the verdict is contrary to the evidence.

III.

That the verdict is contrary to the law and the evidence.

IV.

Errors of law occurring during the trial of the case, and duly excepted to by the defendant.

V.

That the Court committed error by instructing the jury contrary to the law and the facts.

Said motion will be made upon the records and files in this action, and a bill of exceptions to be hereafter prepared.

Cooper Collings & Shreve

Attorneys for defendant.

Dated this 12th day of February, 1923.

No. 4253 Crim.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

-vs-

CLARENCE E. LEWIS

Defendant

MOTION TO VACATE AND SET
ASIDE VERDICT.

Filed

Feb 13 1923

Chas. N. Williams, Clerk
Edmund L. Smith, Deputy
Cooper, Collings & Shreve
Attorneys and Counselors
1011 Washington Bldg.
Los Angeles, Cal.
Phone 60277

At a stated term, to wit: The January Term, A. D. 1923 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of LOS ANGELES, on Tuesday the 13th day of February, in the year of Our Lord one thousand nine hundred and twenty-three, Present:

The Honorable BENJAMIN F. BLEDSOE District Judge.

UNITED STATES OF AMERICA,)	
	Plaintiff.	) No. 4253
vs.		) Crim.S. D.
Clarence E. Lewis,	Defendant)

This cause coming on at this time for sentence of defendant Clarence E. Lewis on the first count of the Indictment; Mack Meader, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendant being present in court with attorney A. S. Silverton, Esq. appearing on behalf of W. L. Wil-

liams, Esq. counsel for the *defenda;t*; it now, on motion of said A. S. Silverton, Esq. it is by the court ordered that Attorney Cooper of Messrs. Cooper, Collings and Shreve be substituted for the defendant and said attorney Cooper having made a motion for a new trial and motion in arrest of judgment and said motions having been denied by the court, it is by the court ordered that defendant be granted ten days to file bill of exceptions; and thereupon the court pronounces sentence upon said defendant for the offence of which he stands convicted, namely, violation of the Harrison Narcotic Act of February 24th, 1919 amending the Act of December 17th, 1914, and it is the judgment of the court that defendant stand committed to the United States Penitentiary at McNeil Island for the term and period of four years on the first count and be remanded to the custody of the United States Marshal.

47/422

In the District Court of the United States

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Southern Division

UNITED STATES OF AMERICA,)

Plaintiff,) No. 4253

vs.

) Crim. S. D.

Clarence E. Lewis,

Defendant.)

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original JUDGMENT en-

tered in the above-entitled cause; and I do further certify that the papers hereto annexed constitute the JUDGMENT ROLL in said cause

ATTEST my hand the seal of said District Court,
this 21st day of Feb. A. D. 1923

CHAS. N. WILLIAMS

(Seal of Court)

Clerk

By B. B. Hansen

Deputy Clerk.

No. 4253 Crim.

In The District Court
for THE UNITED STATES
Southern District of California
SOUTHERN DIVISION

United States of America,

Plaintiff,

vs.

Clarence E. Lewis,

Defendant.

JUDGMENT ROLL.

Filed Feb. 21st, 1923

CHAS. N. WILLIAMS

Clerk

By B. B. Hansen

Deputy Clerk

Recorded Min. Book No. 47 page 422.

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES)	
Plaintiff and respondent,)	
-vs-	)	BILL OF EXCEPTIONS
CLARENCE E. LEWIS,)	
Defendant and appellant.))	

Bill of exceptions of the defendant Clarence E. Lewis, to be used on appeal from the judgment, and order denying defendant's motion for new trial and motion in arrest of judgment herein, and for all purposes for which a bill of exceptions may properly be used.

Be it remembered that the above entitled action was brought on regularly for trial, and was tried before the Honorable Benjamin F. Bledsoe, judge and a jury. The trial commenced on Wednesday, February 7, 1923, at 10:00 o'clock A. M. and continued after the noon recess and completed on the same day, and the jury having heard the arguments of counsel for both plaintiff and defendant, rendered their verdict therein on the 7th day of February, 1923. Mack Meader, Esq., Ass't U. S. Attorney, appeared on behalf of the Government, and W. L. Williams, Esq., appeared as counsel for defendant. The following are the proceedings which took place on and during the trial.

(Testimony of George Moffat.)

GEORGE MOFFAT, called as a witness on behalf of the Government, having been sworn, testified (tr. p. 1, et seq):

DIRECT EXAMINATION

BY MR MEADER:

My name is George Moffat and I am by occupation a chemist and druggist. At the request of Federal Narcotic Agent Wood, on yesterday (February 6) I made an examination of samples of drugs that were furnished me.

RULING AND EXCEPTION NO. 1

Q What samples were furnished you, if you recall?

MR WILLIAMS: That is objected to on the ground it is immaterial.

THE COURT: Overruled.

A I received one small bottle and I took a sample out of one square carton.

Q BY MR MEADER: Showing you this package I will ask you if you ever saw that before?

A Yes sir.

I saw it yesterday at one o'clock.

RULING AND EXCEPTION No. 2

Q Is that the package that was turned over to you by Mr. Wood?

A It is.

MR WILLIAMS: I object to that, if your Honor please, on the ground it is irrelevant and immaterial and no proper foundation laid.

(Testimony of W. R. Wood.)

THE COURT: I suppose you are going to connect it up. Overruled.

MR MEADER: Absolutely, your Honor.

Q That was turned over to you by Federal Narcotic Agent Wood?

A It was.

He requested me to make an examination of the contents, and as a result of that examination I found that the small bottle contained cocaine, and this sample (indicating sample taken from square carton) is morphine sulphate. (Bottle and sample offered and received in evidence and marked "United States Exhibits 1 and 2 for Identification.")

RULING AND EXCEPTION NO 3

MR WILLIAMS: No cross examination. I move at this time that all of the testimony of the witness be stricken out on the ground it is incompetent, irrelevant and immaterial, and no foundation laid.

THE COURT: Denied. Go on.

W. R. WOOD, called as a witness on behalf of the Government, having been sworn, testified (tr. p. 4, et seq):

DIRECT EXAMINATION

BY MR MEADER:

My name is W. R. Wood, and I am a Federal Narcotic Agent with the Bureau of Internal Revenue.

RULING AND EXCEPTION NO. 4.

Q On the 6th of February, yesterday, did you turn

(Testimony of W. R. Wood.)

over to Mr. George Moffat, Chemist, any samples of any drugs to be analyzed?

A Yes sir.

MR WILLIAMS: That is objected to on the ground it is immaterial and no proper foundation laid.

THE COURT: Overruled. What is the answer

A Yes sir.

United States Exhibits 1 and 2 for Identification are the drugs which I turned over to Mr. Moffat. They were taken from the evidence in the office of the U. S. Attorney, in the case of United States v. Lewis, which evidence was in my custody, having been removed by me from the vault of the postal inspectors. It was originally received from Lieutenant O'Brien, of the Los Angeles police force. The various cans and packages in the court room were also turned over to me by Lieutenant O'Brien, and are all part of the evidence in the case of United States v. Lewis.

RULING AND EXCEPTION NO. 5

MR MEADER: I now ask, if the Court please, at this time, that these cans and packages be received and marked for identification.

MR WILLIAMS: That is objected to on the ground it is immaterial and no proper foundation laid.

THE COURT: Overruled.

CROSS EXAMINATION

BY MR WILLIAMS:

RULING AND EXCEPTION NO. 6

MR WILLIAMS: I move at this time that all testimony of the witness with reference to these

(Testimony of W. R. Wood.)

various exhibits be stricken out on the ground it is incompetent, irrelevant and immaterial and no proper foundation laid.

THE COURT: Denied.

RULING AND EXCEPTION NO 7

BY MR WILLIAMS: Mr. Wood, when did you come to this District as Federal agent?

MR MEADER: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

A January 5, 1922.

I first saw Lieutenant O'Brien in connection with these exhibits the morning after the arrest, the exact date I am not sure of, and it was then he turned over to me the articles I have identified, which articles I placed in the vault of the postal inspectors, where we keep all our narcotic evidence. I made a memorandum on my Government report of the contents of the package, put a mark on the paper in which it was wrapped, tied and sealed it. There was no mark on the outside of the package to indicate what were the contents.

REDIRECT EXAMINATION

BY MR MEADER:

The package so placed in the vault, containing the evidence, has never since been out of my custody and control, until the present time. I took it from the vault yesterday morning, and found it in the same condition in which I left it.

(Testimony of T. F. O'Brien.)

RECROSS EXAMINATION

BY MR WILLIAMS:

Mr. C. W. Montgomery is the only person, save myself, who has access to the vault. We do not have keys, but it is opened for us each time by a postal inspector in charge of the office. (tr. 9).

T. F. O'BRIEN, called as a witness on behalf of the Government, testified, (tr. p. 10, et seq.):

DIRECT EXAMINATION

BY MR MEADER: My name is T. F. O'Brien, and I am a Police officer.

RULING AND EXCEPTION NO. 8

MR WILLIAMS: If the Court please, at this time I ask for an order excluding all witness from the courtroom who have not testified.

THE COURT: It will be denied.

I saw the defendant, Clarence Lewis, for the first time, about the 22d day of April, last year, at Eighth & Hemlock Streets, this City. Mr. Mailheu, Mr. Yarrow, and Mr. Boden, of the State Board of Pharmacy were with me at the time.

RULING AND EXCEPTION NO 8

Q On or about the 22d of April of last year did you, or anyone in your presence, or anyone by your direction, have any dealings with this defendant relative to the purchase or sale of narcotics?

A Indirectly, yes sir.

MR WILLIAMS: I ask that be stricken out as not responsive to the question.

THE COURT: Denied.

(Testimony of T. F. O'Brien.)

MR WILLIAMS: Will your Honor hear the question?

MR MEADER: What *di* you mean by "indirectly"?

MR WILLIAMS: That is objected to as immaterial and calling for the conclusion of the witness.

THE COURT: denied.

Q There was a man by the name of George Morris met the defendant at Eighth and Hemlock. They walked down Hemlock to an alley *whci* parallels Eighth Street, between Eighth and Ninth, and they turned east in that alley. It is a transverse alley going south and they turned in that alley and walked down and we followed. Two or three minutes after, possibly five minutes later, I saw the defendant and Morris in the back yard of 842 Hemlock. At that time Mr. Morris had some currency in his hand and the defendant had this box here, walking along carrying it.

I refer to the pasteboard box, Government's Exhibit 7 for Identification. There is a gate there, or fence, about five feet and a half high, and I walked in. As I stepped in they were possibly 12 to 20 feet away from me and the defendant looked up and took the box and tossed in on the porch of a rear house there. I walked over and picked it up and looked in it and then placed him under arrest. The money Mr. Morris had in his hand was his own, as I now recall. I had met Morris uptown, I don't remember where.

(Testimony of T. F. O'Brien.)

RULING AND EXCEPTION No. 9

Q Was anything said at that time when you met him uptown, in regard to the defendant Lewis?

A Yes sir.

MR WILLIAMS: That is objected to on the ground it is hearsay.

THE COURT: Denied.

RULING AND EXCEPTION NO. 10

Q BY MR MEADER: Were any arrangements made by you with Morris to go to the home of the defendant?

MR WILLIAMS: Just a moment. That is objected to on the same ground, unless it can be shown the defendant was present.

THE COURT: Overruled.

A To not go to his home but to meet at Eighth and Hemlock.

Mr. Morris volunteered his services as an informer, and arranged to meet me and the other officers at Eighth and Hemlock. We did not go down to meet the defendant with him, but went into a packing house on Eighth street right opposite the beginning of Hemlock, approximately 50 or 60 feet away. We saw him meet the defendant, and saw them walk down to the alley together.

RULING AND EXCEPTION NO. 11

Q And down this alley to this place at 842 Hemlock?

A It is a transverse alley.

MR WILLIAMS: That has already been asked

(Testimony of T. F. O'Brien.)

and answered, and I object to it on that ground.

THE COURT: Overruled.

We saw them turn into the first alley, and the next time we saw them they were in the back yard at 842 Hemlock Street. The package which defendant threw on the porch, and which I opened before I arrested him, contained two pasteboard boxes and a glass bottle. I do not see a mark on the bottle, U. S. Exhibit 2 for Identification, by which I can identify it as the same bottle that was in the package, but it was a similar bottle. United States Exhibit No. 4 for Identification is the carton that was in the package. I wrote the date on it the same day, and the names of Mailheau, Yarrow and myself, and that is my handwriting on the upper portion.

Q Calling your attention to Exhibit 7 for Identification, is there anything that is in that package now that was in there at that time? Just examine it.

A Yes, this other one that was there.

Q That was in there also?

A Yes sir. These other things were not.

Q These were not in there at that time?

A No sir.

Q But these two packages and a bottle similar to this were there?

A Yes sir.

RULING AND EXCEPTION NO 12

MR MEADER: I would ask at this time, if the Court please, to have United States Exhibit No. 4 for Identification, United States Exhibit No. 2 for Iden-

(Testimony of T. F. O'Brien.)
tification, and this other package which we will call Exhibit 8 for Identification, be received in evidence at this time as United States Exhibits 1, 2 and 3.

MR WILLIAMS: That is objected to on the ground that no proper foundation has been laid. It has not been shown whether the alleged exhibits were seized by due process of law or not.

THE COURT: Overruled.

After placing the defendant under arrest, Mr. Yar-row, Mr. Mailheau, Mr. Boden, the defendant and myself went upstairs at 842. I think the defendant's sister was also along. In a trunk upstairs we took out some more of those metal boxes, referring to the cans, Exhibits 3 and 4 for Identification. I made a mark on one of them. This is one that we found in the trunk.

RULING AND EXCEPTION NO. 13

MR MEADER: We ask to have that received as United States Exhibit No. 4

MR WILLIAMS: We object to that as incompetent, irrelevant and immaterial, no proper foundation laid, and no showing that it was seized by due process of law, or that it is competent testimony.

THE COURT: Overruled.

THE CLERK: That is United States Exhibit No. 3.

I remember a can like the other one, with the same contents, and in my opinion it is the same.

RULING AND EXCEPTION NO 14.

MR MEADER: I ask to have this received as

(Testimony of T. F. O'Brien.)

United States Exhibit No. 4.

MR WILLIAMS: Same objection.

THE COURT: Same ruling.

We brought the defendant down to the Station and booked him. When I saw the defendant throw the pasteboard box onto the porch I came through the gate alone, and Mr. Mailheu was in the adjoining yard. Mr. Yarrow was around in front, and Mr. Boden was with him. When I met Morris uptown he had no packages of any kind with him, nor did the defendant have any package, to my knowledge when he met morris. They were standing approximately four or five feet from the porch, possibly less, when defendant threw the pasteboard package on the porch. I do not know where defendant's sister was at the time I placed defendant under arrest, she was not in sight, but came up from the direction of the house, with some man, shortly after. I believe she said the man was her husband. The cans, boxes, bottles and things I seized I turned over to Federal Agent Wood, and he gave me a receipt for them.

CROSS EXAMINATION

BY MR WILLIAMS: N(tr. 21, et seq):

RULING AND EXCEPTION NO. 15

Q Mr. O'Brien, at the time that you sent George Morris down there you had pending against him in Judge Chambers' court two charges, did you not?

MR MEADER: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Sustained.

(Testimony of T. F. O'Brien.)

MR WILLIAMS: If your Honor please, that goes to the motives of this testimony, in testifying.

THE COURT: Sustained.

MR WILLIAMS: I want to show, if your Honor please, that they had this complaint - -

THE COURT: Well it is sustained.

RULING AND EXCEPTION NO. 16

Q BY MR WILLIAMS: Well, you had arrested Morris before that, had you not?

MR MEADER: Objected to as incompetent, irrelevant and immaterial

THE COURT: Sustained. That hasn't anything to do with this case.

MR WILLIAMS: If your Honor please, wouldn't it have something to do with this case?

THE COURT: No, it hasn't anything to do with this case. The Court has ruled.

Mr. Morris volunteered to go, and we told him we would meet him there.

RULING AND EXCEPTION NO. 17

A And you knew, and had known for many years, that George Morris was a notorious addict?

MR MEADER: Just a minute. Objected to as incompetent, irrelevant and immaterial.

THE COURT: Sustained.

He told us that he could buy morphine, and we took the numbers of his bills. When we arrested the defendant Morris still had the money in his hand. I don't know whether I could see over the board fence at the back of 842 or not, I looked through the cracks.

(Testimony of T. F. O'Brien.)

I could hear them talking, and looking through saw them. They were walking toward the gate. There is a little cottage right near the gate, on the rear of 842, but they were in line so I could see them. I did not see any transaction, saw no money change hands. That was from three to five minutes after we had seen Morris. Probably fifteen or twenty minutes elapsed from the time we met Morris down town and the time we met him out there. He went out on the street car, and we in the automobile. I never saw the package in Morris' possession.

DIRECT EXAMINATION

BY MR MEADER: (tr. 26, et seq.):

There was no arrangement made with Morris as to the time when we were to show on the scene. When I opened the gate and saw Morris and the defendant coming toward me there was no one else in the back yard that I could see. The crack in the fence through which I looked was about three eights or a quarter of an inch wide, and I could see the entire persons of both Morris and the defendant. I noticed the box in the defendant's hand, but didn't see the money in Morris's hand until after I had stepped into the yard. I had stepped into the yard and was possibly ten feet from the defendant when he threw the box onto the porch. We had some conversation at that time, but it was so long ago that I don't recall just what was said. About the time I placed the defendant under arrest, after looking into the package, Mr. Mailheu climbed over the fence. It was after

(Testimony of T. J. Mailheau.)

I had picked up the box and turned around that I first noticed the money in Morris's hand. I believe I took it from him and looked at it. It was currency, but I don't remember just how much. (tr. 29).

T. J. MAILHEAU, Called as a witness on behalf of the Government, testified (tr. p. 30, et seq.):

DIRECT EXAMINATION

BY MR MEADER:

My name is T. J. Mailheau, and I am and was about the 22nd of Last April, a Detective Sergeant of the Police Department. I first saw Clarence Lewis, the defendant, on the 22d of last April, at Eighth and Hemlock Streets. I was with Detective O'Brien, Detective Yarrow and Mr. Boden, and I saw the defendant meet George Morris on the southwest corner of Eighth and Hemlock. The two stood there for about a minute and talked, then walked south on Hemlock Street until they came to an alley, crossed over on the east side of Hemlock Street, and went down that alley east off of Hemlock. I next saw the defendant when he was going down the alley south and running parallel with Hemlock Street; and again I saw him as he turned in a gate in the rear of a building on Hemlock Street, which I afterward found was 842. I was probably 300 feet away as he turned in, at the corner of the alley that runs east from Hemlock Street and the one that runs parallel. There is a jog in the alley. I waited until he turned, then walked south on the alley, with Lieutenant O'Brien who was

(Testimony of T. J. Mailheau.)

behind me. I went in at the rear of the first place north of 842 Hemlock Street, and went in the back yard. I went up to the fence between the two places, a board fence about six feet tall, and looked between the boards and saw Morris standing there. He was later joined by Mr. Lewis, in about a minute and a half, and Mr. Lewis had a package with him. They walked east in the yard, and the next thing I knew I saw Mr. Lewis throw the package he was carrying, and it landed on the porch of a building in the rear of 842 Hemlock Street. I do not know where Lieutenant O'Brien was at that time. The next I saw of him was when he threw the package over the fence, and as I climbed over the fence I noticed that O'Brien had the defendant by his sleeve and was pulling him toward the porch where the package lay. As soon as I got over the fence I grabbed the other man, Mr. Morris, who had a number of bills in his hand. Mr. O'Brien picked up the package and glanced in it, and I too examined it after I joined O'Brien with Morris. The package was identically like Plaintiff's Exhibit 7. United States Exhibit No. 4, also Exhibit 1 were inside it, and a bottle identically like Exhibit 2. I cannot say at this (continued next page)

time whether it is the same bottle or not. I thought I had my initials on it, but I don't seem to find them.

RULING AND EXCEPTION NO. 18.

MR. WILLIAMS: I move to strike out all of the testimony of this witness with reference to that bottle.

(Testimony of T. J. Mailheau.)

THE COURT: The motion is denied.

MR. WILLIAMS: Exception.

Q. BY THE COURT: You said it was just the same as this bottle, did you?

A Practically just the same. There was two paste-board boxes and then a bottle identically like that.

I opened the box to see what was in it.

RULING AND EXCEPTION NO. 19.

Q What was in it,

A In my judgment I would say it was filled with cocaine.

Q Have you had any experience with morphine or cocaine?

A I have, for four years.

MR WILLIAMS: I move to strike out that it was filled with cocaine, on the ground that no proper foundation has been laid.

THE COURT: The motion is denied.

After the defendant had been placed under arrest and the box recovered from the porch where it was thrown, Mr. Boden and Mr. Yarrow joined us and asked the defendant where he lived. He said in that house and Boden suggested that we go up to his room and search it. Just about that time the defendant looked at Morris and said "You damned stool pigeon", and then Mr. Boden suggested that we take the fellow Morris and put him in one of the two machines we had. We went upstairs, and on the second floor, in a north front room, which defendant said was his room, we found some marajuna in different cans, some

(Testimony of T. J. Mailheau.)

marajuana cigarettes that had been partly smoked; a box containing a powder Substance which I would say was powdered opium; part of an opium pipe—that is, a kind of common pipe with a little rubber hose attachment, and on the top a kind of brass bed, with a hole in it; then we found in a trunk about thirty-five pint bottles of whiskey, and two or three revolvers, a shot-gun and rifle, if I remember correctly.

RULING AND EXCEPTION NO. 20

MR WILLIAMS: I move that all testimony of the witness with reference to this conclusion as to any narcotics be stricken out on the ground that no foundation has been laid.

THE COURT: Denied.

MR WILLIAMS: Exception.

RULING AND EXCEPTION NO. 21

Q BY MR MEADER: Did you find in this trunk any drugs or narcotics of any kind?

MR WILLIAMS: That is objected to as leading and suggestive.

THE COURT: The objection is overruled.

A We did. We found some marajuana in that trunk, and some powdered opium in the pipe.

This is the pipe (referring to Exhibit) only with a piece of rubber hose with a kind of mouthpiece on it, which was lying right alongside of it. I would say this is the same one, or identically like it.

RULING AND EXCEPTION NO. 22

MR MEADER: I will ask that this be received in evidence.

(Testimony of T. J. Mailheau.)

MR WILLIAMS: It is objected to on the ground that no proper foundation has been laid and that it has not been properly identified.

THE COURT: In what respect has no foundation been laid?

MR WILLIAMS: He says it was one like it, but I don't know whether it was the same one or not.

THE COURT: The objection is overruled.

MR WILLIAMS: Exception.

The defendant was present in the room at all times during the search and his sister, and another gentleman was there part of the time.

RULING AND EXCEPTION NO. 23

Q Now, referring back to the time you were standing at the fence in the alley, looking through the fence between the lots, I want to ask you if you are positive that you saw this defendant *through* that package over onto the porch.

MR WILLIAMS: That is objected to as already asked and answered.

THE COURT: The objection is overruled.

A I did; yes sir.

CROSS EXAMINATION

BY MR WILLIAMS: (tr. p. 38, et seq):

I was the first one to go down the alley, and I went into the back of 836, looking for a basement, but not seeing one there I went towards the fence, hearing some conversation in the next yard. I am not sure as to the number 836, but it was the first place north of 842. I do not recollect having had any con-

(Testimony of T. J. Mailheau.)

versation with the lady of that house. I probably was in that yard about a minute before I climbed the fence. Mr. Boden was not with me until after the defendants were placed under arrest. Boden and Yarrow had started down Hemlock and O'Brien and myself started east on the alley off of Hemlock. I do not remember anyone being with me in the alley at 836, there might have been some one else there, but I do not remember it now. The fence was about six foot high, but there were a number of places where one could look through it, and I looked through a crack, and afterward climbed the fence. I stood close to the fence.

George Morris was not in defendant's room during the search, he was taken and put in the machine immediately after the arrest. When defendant called Morris a stool pigeon, Morris requested that we get him away from there, and said "I didn't have a chance to give him the money."

RULING AND EXCEPTION NO. 24

Q Was anything said in that conversation by Morris there to the effect that you officers had some cases hanging over him in the police court?

MR MEADER: That is objected to as incompetent, irrelevant, and immaterial.

THE COURT: The objection is overruled, if it was any part of that conversation.

(Last question read).

A No sir.

I was in the room at all times when we were up-

(Testimony of Lloyd R. Yarrow.)

stairs until I took the trunk and the other articles out, shortly before the defendant was taken out, if I remember (tr. 43)

LLOYD R. YARROW, called as a witness on behalf of the Government, testified (tr. 44, et seq):

DIRECT EXAMINATION

BY MR MEADER:

My name is Lloyd R. Yarrow, and I am and was on April 22, last, a police officer. I saw the defendant Clarence Lewis on that date, at Eighth and Hemlock Streets, and at 842 Hemlock Street. I went upstairs in the house at the time the search was made, after the arrest, together with Officers O'Brien, Mailheau, and Inspector Boden of the State Board of Pharmacy and the defendant, and participated in the search. These exhibits I saw in defendant's room at 842 Hemlock Street. The pipe with the brass attachment, United States Exhibit No. 10, was there at that time. I first saw it in the possession of one of the officer's, but do not know just which one found it.

I first saw the package which was found in the back yard at 842 Hemlock Street, in the possession of Mr. O'Brien.

RULING AND EXCEPTION NO. 25

Q Did you see what the contents were at all?

A Yes sir.

Q What were they, to the best of your recollection?

(Testimony of Lloyd R. Yarrow.)

A Morphine and cocaine.

Q Just loose?

A No, they were in *spearate* packages. There was two ounces of morphine and a bottle of cocaine.

MR WILLIAMS: I move to strike that out as calling for a conclusion and opinion on the part of the witness, and no proper foundation laid.

THE COURT: The motion is denied, No objection was made.

Q BY MR MEADER: What experience have you had with morphine or cocaine do you know it when you see it?

A Yes sir, I have had about four years experience with it.

THE COURT: That ought to be enough.

Exhibits No. 4 and 8 were in that package at the time I first saw the contents of it, and a bottle similar to Exhibit 2, but I couldn't state positively that it is the same. I didn't examine it at all. The first time I saw Lewis on the premises on Hemlock Street, he was in the rear of the house at 842, after he had been placed under arrest.

RULING AND EXCEPTION NO. 26

Q At that time did you hear any statements made by the defendant regarding this morphine or cocaine or these narcotics?

MR WILLIAMS: That is objected to on the ground that no foundation has been laid.

THE COURT: In what respect?

(Testimony of Lloyd R. Yarrow.)

MR WILLIAMS: There is no foundation as to time, place, or persons present.

THE COURT: He is asking him if he heard any statements made in the back yard at that time and place on that afternoon.

MR WILLIAMS: Whether he had been informed of the nature of the charge against him or whether --

MR MEADER: I didn't ask him what he said, your Honor.

(Last question read).

THE COURT: The objection is overruled.

A There was some statements made at the time that I --

MR WILLIAMS: Just a moment, I submit the witness should answer yes or no.

THE COURT: He did: He said there were some statements made. Go on.

A (continuing) But I wouldn't say as to what they were. I don't remember. It has been so long ago.

There was statements made by defendant relative to the transaction after his room had been searched, but I don't remember what they were. I put no marks on any of the articles shown me by counsel.

RULING AND EXCEPTION NO. 27

MR WILLIAMS That is all.

MR MEADER: That is the Government's case.

MR WILLIAMS: I now move to dismiss as to Count 2 on the ground that there is no proof before

(Testimony of Clarence E. Lewis.)

the Court and jury to show that there was no barter, sale, exchange, or giving away as charged in Count 2.

THE COURT: The motion is denied.

MR WILLIAMS: Exception.

CLARENCE E. LEWIS, defendant herein, having been duly sworn as a witness in his own behalf, testified (tr. 50, et seq)

DIRECT EXAMINATION

BY MR WILLIAMS:

My name is Clarence E. Lewis, and I conduct a pool hall, cigar stand and shoe shining stand at 1308 East Ninth Street. I was engaged in that business on the 22nd day of April, and have been for about two years. I came out of the Army just prior to engaging in the business, in April, 1919, receiving an honorable discharge. I was living, on the 22nd of April, at 842 Hemlock Street, and there were residing there beside myself two sisters, a couple of roomers and a brother. About noon on the 22nd I was going to the bank at Eighth and Central to get a check cashed. When I got to Eighth and Central I reached in my pocket to see if I had the check and discovered I had forgotten it, so I turned back toward the house to get it, and at Eighth and Hemlock I met Morris. I went with him down Hemlock Street to the alley and east in that alley to the next one that comes right in back in the rear of the house, and on down the alley south. I did not sell any narcotics to Mr. Morris on that occasion, and I did not

(Testimony of Clarence E. Lewis.)

sell him the narcotics set forth in Count 1 of the indictment in this case. There was no particular conversation between Morris and I about narcotics at that time. He was asking me about some people who lived in the rear of the house at 842½ Hemlock Street, back of the house I lived in, and I told him I was going back there. He said he would go with me. I left him standing in the back yard and went to the porch and called my sister and asked her if the woman still lived there. She said she was *woking* at the time, and I came outside and was starting across the yard with Morris when Officer O'Brien ran into the yard. The package that was found in the yard was not mine, and I had never seen it before. I didn't have it in my hands, it was on the porch. Morris did not give me any money in connection with the package. As we were walking toward the gate the officer ran in the yard and grabbed me and asked me why I threw that package on the porch. I told him I hadn't thrown it, and that it must belong to him. When Boden came in he said to Morris, "Well, you are up to it again?" and he answered, "Well, you know I use this stuff, and I am out on \$2000 bail, "or something like that. I don't remember just what he did say. I was arrested and they took me upstairs. I showed them where I stayed and they went through an old trunk what I had, full of junk, practically. It had been down in the basement all the time I was in the Army, and was never unpacked. I don't know whether they took anything out of it or not. (tr. 54).

(Testimony of Clarence E. Lewis.)

I frequently, go through the gate in the rear of 842; it pulls out, north. There are no cracks in it. I was just in the back yard long enough to go in and ask if Mrs. Campbell was still back there, and come right out again. I just called from the inside of the porch. (tr. 55)

CROSS EXAMINATION

BY MR MEADER:

I have lived at 842 Hemlock possibly eighteen years or more. I don't remember if the fence was there when I went to war, but it was there when I came back, has been there about three years, anyway. It is made of box wood, and fits right together. That is, the gate has no cracks in it. I think there are some cracks in the fence. After I told Morris that the woman would probably be there later in the day he pretended he did know the way out, and I started over toward the gate and told him. I was in front of the little house, possibly twenty or more feet from the gate at that time.

RULING AND EXCEPTION NO. 28

Q You didn't Tell him, "Why, there is the gate over there", did you?

MR. WILLIAMS: That is objected to as *argumentive*.

THE COURT: The objection is overruled.

A You couldn't see the gate from where we stood at. You had to come to the side.

I first saw the package in evidence when the officer picked it up from the floor of the porch, of the rear

(Testimony of Clarence E. Lewis.)

house. It is an open porch, and there is a *log* of junk on it. This happened about 11:30 or 12, I believe. The package, when I first saw it, was wrapped in newspaper, and lying right there on the porch so that it could be seen. It was not on the porch of the house where I live, but on the porch of the house Mrs. Campbell lived in. I didn't throw it there. (tr. 58)

I know nothing about the pipe in evidence. There was lots of junk in that trunk, and it had been in the basement ever since I had been in the Army. I don't know what was in it. I never had any marijuana around there, or any marijuana cigarettes. I saw the officers take these cans and things out of the trunk. I had no clothes in the *runk* except a soldier's uniform. I just tossed the uniform in on top of a lot of junk. They didn't show me anything they took out of the trunk; they just took the trunk away from me.

I didn't say anything to Morris about being a stool pigeon (tr. 59). I said to my sister, "This fellow has framed up on me; he must be some kind of a stool pigeon or something"; That was after she came down (top of page 60).

I had seen Morris from time to time, before that, coming in my place, my pool room. I believe Morris did have some money in his hand after the officers came in, at least he had something in his hand. I wasn't paying any special attention to him. The officers did not tell me what I was under arrest for. They just said "What did you throw that package down

(Testimony of Clarence E. Lewis.)

there for?" I told them it was not mine, that it must belong to his man. Morris didn't have a package when I met him, nor at any other time that I saw him that day. I believe I did ask Mr. O'Brien what I was under arrest for, and he said "You are under arrest for having that dope there". I don't believe he said anything about me being under arrest for selling narcotics. My sister was in the house at the time, but came out shortly afterward. I don't remember whether she asked the officers what I was arrested for or not, or whether they told her.

Hemlock Street is east of Central Avenue, and runs south from Eighth. My place of business is at 1308 East Ninth Street. I frequently go in the back way, or get to my house, 842 Hemlock, and went in that way that day because Morris asked me about the people in the rear house and it was closer that way. I intended to knock on the door and call the people. I stopped at the little house on the way in, and then went inside the porch and called to my sister. (tr. 63) No one answered in the little house, and I don't think anyone was there. The house I live in is a two-story house, a little house sets right on the alley, and there is a space between the back of my house and the front of the little cottage, of possibly twenty or twenty-five feet. The cottage occupies nearly all of the rear lot, except a space about eight or ten feet, which is covered by the gate (tr. 64)

(Testimony of Annie Earley—Blanche Jones.)

ANNIE EARLEY, called as a witness for the defendant, testified, (tr. 65, et seq):

DIRECT EXAMINATION

BY MR WILLIAMS:

My name is Annie Earley, and the defendant Clarence Lewis is my brother. I live with him at 842 Hemlock. On the 22nd of April, the day of his arrest, and shortly before his arrest, he came to the back stairs and called and asked me if Mrs. Campbell still lived in the rear. I said yes, "but you had better go and knock on the door and see," because Mrs. Campbell sometimes goes out in service. I could see him when he asked me, but I paid little attention because I was housecleaning. I didn't see any package in his hand. After talking with me he just went down the back steps. I live upstairs. (tr. 66).

CROSS EXAMINATION

BY MR MEADER:

I was in the kitchen when he spoke to me, and I came out on the porch. He stood half way up the kitchen steps and talked to me. He could not see me from where he stood, but I could see him.

BLANCHE JONES, called as a witness on behalf of the defendant, testified (tr. 67, et seq):

DIRECT EXAMINATION

BY MR WILLIAMS:

My name is Blanche Jones, and I live at 836 Hemlock, next door to 842. I was living there on the 22nd of April, and recall the time the defendant was ar-

(Testimony of William McKinley Dixon.)

rested. Just before his arrest I observed two officers in my back yard. They came around the front, on the side farthest from 842. The entrance to my house is on the north side, and the entrance to 842 is on the north side. I saw them going around.

CROSS EXAMINATION

BY MR MEADER:

I was in the dining-room when I saw them. They were dressed as they are today. I saw them walk past my dining-room window, and on in back. They didn't stay long, but came right after. One was a heavy set man. (tr. 69)

WILLIAM MCKINLEY DIXON, a witness for the defendant, testified (tr. 70):

DIRECT EXAMINATION

BY MR WILLIAMS:

My name is William McKinley Dixon, and I am a vocation trainer. I have known the defendant about two years.

RULING AND EXCEPTION NO. 29

Q Do you know his general reputation in the community in which he resides for truth, honesty, and integrity?

THE COURT: Wait a minute. That is not involved -- truth, honest and integrity. That is not the issue in this case. The question is, is he a law-abiding citizen?

Q BY MR WILLIAMS: Do you know his general reputation as to whether he is a law-abiding citizen in the community in which he resides?

(Testimony of George W. Dickerson—John A. Irvin.)

A Since I --

THE COURT: Do you know his general reputation?

A As far as I know, yes.

As far as I know his general reputation is good.

GEORGE W. DICKERSON, called as a witness on behalf of the defendant, testified (tr. 72)

DIRECT EXAMINATION

BY MR WILLIAMS:

My name is George W. Dickerson, and I have known the defendant for the last ten or twelve years. To my knowledge he has been a law-abiding citizen since I knew him.

JOHN A. IRVIN, called as a witness for the defendant, testified: (tr. 73)

My name is John A. Irvin. I have known the defendant since 1913. His reputation is good as far as I know. I have never known him to have any police reputation. His general reputation is good.

- - - - -

Thereupon the Court instructed the Jury as follows:

ORAL INSTRUCTIONS

THE COURT: Gentlemen of the jury, I will ask you to listen carefully to the instructions of the court which will guide you in your deliberations.

The defendant here is charged with two asserted violations of the law growing out of the same transaction and alleged to be in violation of the Harrison anti-narcotic law. The counts relate to the same

transaction and are stated differently merely because of the different provisions of the law which it is alleged are violated by the same transaction. They had to do with the same transaction, of course. It being alleged in the first one that, as you will remember, the defendant, on or about the 22d day of April, did knowingly, wilfully, unlawfully, and feloniously deal in and distribute certain narcotics, to wit, one ounce of cocaine and two packages containing about one ounce each of morphine sulphate, without having registered and paid the special tax as required by the Harrison anti-narcotic law, the defendant being then and there a person required to register and pay the special tax under and by virtue of said act.

The second count charges that the defendant did knowingly, wilfully, unlawfully, and feloniously sell, barter, exchange and give away a certain derivative of coca leaves and a certain derivative of opium, to wit, one ounce cocaine and two packages containing about one ounce each of morphine sulphate, not in pursuance of a written order in blank provided for that purpose by the Commissioner of Internal Revenue; and that the said defendant was then and there a person required to register and pay the special tax.

To that the defendant interposed a plea of not guilty, and the question for you to determine is whether or not he did conduct himself as alleged.

Now, this indictment is a mere charge or accusation against the defendant, of course, required under our law, that the defendant may be brought before the bar of the court for trial. It of itself is not any

evidence against the defendant, and you are not to consider it as evidence. Neither are you to permit yourselves, of course, for any reason, or on any account, to be prejudiced against the defendant because an indictment has been brought against him. The question for you to consider is what do the proofs here show. It is the duty of the jury to determine whether or not the defendant be guilty or not guilty of the offense charged, considering all of the evidence in the case.

It is not for you to consider the penalty prescribed for the punishment of the offense charged, and if you are aware of the penalty prescribed by law it is your duty to disregard that knowledge. In other words, your duty is to say whether or not the defendant is guilty of the thing he is charged with under the evidence, and then after that very high and responsible duty shall have been performed by you, and if you find the defendant guilty, it will be the duty of the court to say what judgment shall be imposed upon him in order that the requirements of the law and demands of good society and security here in our midst be met. It will be for the Court to decide what punishment shall be imposed, and if you should find the defendant guilty I think you may rely upon the good judgment and discretion of the Court being exercised in that behalf. In other words, you need not concern yourselves at all about the punishment to be pronounced; you concern yourselves with the thing that devolves upon you, to say whether or not he has done the thing charged.

In this connection, gentlemen, you are instructed that juries are impaneled for the purpose of agreeing upon a verdict if they can conscientiously do so. It is true that each juror must decide the matter for himself, yet he should do so only after a consideration of the case with his fellow jurors and he should not hesitate to sacrifice his view or opinions of the case when convinced that they are erroneous, even though in so doing he defer to the views or opinions of others.

You are also instructed that you are the exclusive judges of the credibility of the witnesses whose testimony has been admitted in evidence herein and of the effect and value of such evidence. It is for you to say what the truth is here in this controversy—where the truth lies. Your power in this regard, however, is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of law which will be given you by the Court.

In the Federal Court, as you well know, it is the function and privilege of the Court, if it feels the necessities of the case justify or seem to require it, to express to you its own opinion respecting the merits of the case or respecting the evidence adduced; and during the course of these instructions I may take occasion to express to you some opinion of my own respecting the merits of the controversy, but if I do you are to remember at all times and keep in mind the fact that no expression of opinion coming from the Court with respect to the facts of the case is binding or conclusive upon you. You are brought here

by the law and by the Government in order that your own independent judgment may find reflection in the verdicts rendered, and that is what we want, your independent judgment; so you are not bound, as to matters of fact, by any expression of opinion that may come to you from the Court.

In arriving at a determination as to the credibility of witnesses you will remember that every witness is presumed to speak the truth, but this presumption of truthfulness on the part of every witness may be repelled by the manner in which he testifies; that is, is his manner straightforward or halting; is it expressive of candor and frankness, or is it suggestive of chicane and concealment? The presumption may be repelled by his appearance upon the stand, by the character of testimony given, if it be unreasonable or improbable in its nature, or by the giving of false or perjured testimony by him, if such has been given, or by his motives in the case as they may have been developed, if any, by his interest in the case or its outcome on one side or the other, by any bias he may have exhibited, or by contradictory evidence.

A witness may be impeached by the party against whom he was called by contradictory evidence, or by evidence that he has made at other times, statements inconsistent with his present testimony; and if you believe that any witness has been impeached, or that the presumption of truthfulness attaching to the testimony of such witness has been repelled, then you will give the testimony of such witness such credibility, if any, as you may think it entitled to.

Now in this case the defendant himself has taken the stand and offered evidence, and that is his right, and in the main you are to judge the credibility to be accorded to him, if any, by the same standard and the same rules that you apply to other witnesses, with this one exception, that in addition to the matter of noticing his demeanor and the character of his testimony and whether or not it is contradicted, and so forth, as I have called your attention to with respect to other witnesses, you are to weigh his testimony in the light of the fact that he is the defendant in the case and is interested in the outcome of the case in that particular behalf.

You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds as against a less number or as against a presumption or other evidence satisfactory to you.

In civil cases the affirmative of the issue must be proved, and when the evidence is contradictory a decision must be in accordance with the preponderance of the evidence, that is, in accordance with the greater weight or worth of the evidence; but in criminal cases, of which this, of course, is one, guilt must be established beyond a reasonable doubt, and the burden of establishing such guilt rests upon the Government. The law does not require the defendant to prove himself innocent, but the law requires the Government to prove the defendant guilty in the manner and form as charged in the indictment beyond a reasonable

doubt, and unless the Government has done this it is the duty of the jury to acquit.

There are two classes of evidence, gentlemen, recognized and admitted in courts of justice upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eyewitness to the commission of the crime, one who saw the thing done which was actually a violation of the law; the other is testimony in proof of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime,—in short, any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant but inconsistent with any other reasonable conclusion, the law then makes it the duty of the jury to convict.

The defendant, gentlemen, has offered evidence here of possession by him of a good reputation in the community with respect to the trait involved, to-wit, his disposition to be a law-abiding citizen, the evidence of good character, or good reputation, when proven, or when good reputation is proven, it becomes a fact in the case and is a circumstance tending in a greater or less degree to establish his innocence. It must be considered in connection with all the other facts and circumstances of the case, and it may be sufficient in

itself to raise a reasonable doubt of the defendant's guilt; but if, after a full consideration of all the evidence adduced, the jury believe the defendant to be guilty of the crime charged they should so find, notwithstanding the proof of good character or good reputation.

The law presumes a defendant charged with crime to be innocent until he shall have been proved guilty beyond a reasonable doubt, and this presumption of innocence remains with the defendant and will of itself avail to acquit him unless it be overcome by proof of his guilt beyond a reasonable doubt, and if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence you should do so and in that case find him not guilty.

You are further charged that a reasonable doubt, with respect to which I have been speaking, is a doubt based on reason and which is reasonable in view of all of the evidence; and if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt and you should convict him.

By such reasonable doubt you are not to understand that all doubt is to be excluded. It is impossible in the determination of these questions to be absolutely certain. You yourselves were not down there in that alley off Hemlock Street last April or May, or whenever it was, and you yourselves cannot know with certainty just exactly what did take place. You are required to decide the questions submitted to you from the evidence and upon the strong probabilities of the case, and to justify a conviction the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt. As long as you have a reasonable doubt of the defendant's guilt you may not convict him. When, weighing all the evidence, you have an abiding conviction and belief that the defendant is guilty it is your duty to convict; and no sympathy for him or for his family or for his plight or anything of the sort justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of the law or evidence or facts.

Now, the statute, gentlemen, under which the defendant is prosecuted, being a law passed by the United States Congress, is of some considerable length, but I will call your attention only to those portions of it that seem to be most relevant and material. Its purpose, as I indicated to you at your impanelment this morning, is to throw such limitations and safeguards and impediments, if you please, around the traffic in drugs as to make it less desirable for one to engage in that and to punish those

who do engage in it without they conform to the requirements of the statute; and, really, the purpose of it was to bring about, if possible, some substantial abatement of the traffic in drugs. In line with that it is provided that -

“On and after July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves or any compound, manufacture, salt derivative or preparation thereof shall register with the Collector of Internal Revenue of the District his name or style, place of business, and the place or places where such business is to be carried on and pay the special taxes hereinafter provided.”

A provision that those who engage in the business of dealing in drugs shall register with the Collector and pay a tax for the privilege of doing it.

Then it is further provided that -

“It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer or give away any of the aforesaid drugs without having registered and paid the special taxes as imposed in this section.”

Now there is no evidence here that the defendant did register; no evidence that he paid a tax; and therefore it is fair to assume that he did not register and did not pay the tax, so that if he did deal in these drugs not having registered and not having paid the tax he is guilty of violation of the law—if you find that to be the fact.

Then it provides for the assessment and levy and collection of a special tax, which I will not call your attention to, it being unnecessary at this time.

And it is further provided:

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession the same may be found.”

Then there is another provision that -

“It shall be unlawful for any person not registered under the provisions of this act and who has not paid the special tax provided for by this act to have in his possession or under his control any of the aforesaid drugs and such possession or control shall be presumptive evidence of a violation of this section and also of a violation of the provisions of Section 1.”

That section I have just called your attention to. So that the possession of such drugs is presumptive evidence that the person is engaged in the business of dealing in or distributing such drugs, and any person who violates or fails to comply with any of the requirements of this act shall, upon conviction, be punished as required by law.

Now, while possession is, under the statute, presumptive evidence of the fact that he is dealing in and distributing drugs, of course that is a mere presumption, and the question for you to determine is to be

determined from all the evidence in the case, taking all of the presumptions -- the presumption of innocence and the other presumptions -- and from all of that it is for you to say whether, under the evidence, it has been proved beyond a reasonable doubt that he was, on the date mentioned, engaged in the doing of the things with which he stands charged.

Now, in the first count -- recalling that to your attention, gentlemen -- the defendant is charged with dealing in and distributing certain narcotics, and if, with respect to the first count, you should find and believe beyond a reasonable doubt that the defendant was dealing in or was distributing narcotics you should find him guilty. To deal in narcotics does not necessarily imply that there must have been a sale of narcotics and money received. A man deals in a thing if he has it and offers *offers* it for sale and is ready for the sale. Now it is obvious here in this case under the evidence that there was no sale consummated, so that the second count of the indictment, which charges the selling or bartering or exchanging or giving away -- it is difficult to say, under the evidence, whether or not the defendant was giving away any of these drugs or narcotics, but seemingly, although they both relate to the same transaction, the evidence is hardly strong enough to support a conviction on the second count, because of the fact that no sale was consummated, and it is difficult to say whether or not he was trying to give it away. It would hardly be supposed that he was. So I do not think you need to pay very much attention to the second count because of the

condition of the evidence. But the evidence is to the point that he was dealing in narcotics, and it is for you to say now what the worth and effect and weight of that evidence is.

Now you have heard the evidence of these officers who went down there and *wo* witnessed, as they say, the transaction, and you have the discoveries that they made. If it is a fact that this defendant went there to his house and got these drugs and was just about to make a sale of them to this man Morris, if that was the fact, then he was dealing in these drugs and ought to be convicted, if you believe that beyond a reasonable doubt, whether a sale was made or not. You do not have to make a sale in order to be a dealer in these drugs. If you have a reasonable doubt as to whether or not that is the case, then of course you should acquit him. A man in the usual order of things would not be having in his possession that amount, and under those circumstances, as detailed by the officers, if you believe their testimony, without being a dealer, or without being engaged in a transaction that was looking to the consummation of a sale. So, really, the whole question is whom do you believe. If you believe the defendant, that he did not have the package in his hand; that it was not his; that he did not throw it on the porch; that he did not know anything about it; or if you have a reasonable doubt as to whether or not that is the case, then you should acquit him, because if that be true, or you have a reasonable doubt as to whether that is true, then he could not, under the evidence, be found guilty

of being a dealer in these narcotics. On the other hand, if you believe the testimony of the officers that he did have this in his hand, and when the officers came he did throw it on to the porch, that would lead irresistibly to the conclusion in the mind of any reasonable man that it was his, and, in connection with the fact that the money was in the other man's hand that a sale was about to be consummated, and that therefore he was a dealer. So it is just a question, as I have said, -- and that is the only question in the case -- whom do you believe? These officers have testified that they saw certain things that took place through the cracks in the fence there, certain things that are inconsistent with innocence on the part of the defendant, and that is met by the denial of the defendant. The defendant's interest in the case you must take into account in determining the degree of credibility on his part, the officers, if they are not telling the truth, are perjuring themselves in this case. They have testified positively that they looked through the fence and saw this man with these drugs in his hand, and one of them testified that he threw it away on the porch. Now, these officers are either here telling the truth or they have perjured themselves, one of the two, and you must ask yourselves the question what is there in the transaction, what is there in the nature of the evidence offered, what is there before the Court to justify you in believing that these officers have deliberately committed perjury? Because that is the answer to it. Either they have committed perjury

or else this man is guilty; and it is for you to say where the truth is; it is for you to say whom you will believe and where the reason and the probability of of the thing lies. If you believe beyond a reasonable doubt that the defendant was in the possession of this and was dealing in it, or was about to make a sale, you ought to find him guilty. If you have a reasonable doubt of it of course with the same promptitude you should find him not guilty.

Are there any exceptions to the charge?

ME. MEADER: No exceptions.

(No exceptions on behalf of defendant).

* * * *

The foregoing Bill of Exceptions is hereby allowed & settled and ordered of record herein

Bledsoe

5/12/23

Judge

[Endorsed]: No. 4253 Crim. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION UNITED STATES, Plaintiff and respondent -vs- CLARENCE E. LEWIS, Defendant and appellant (Engrossed) BILL OF EXCEPTIONS Recd copy of within this 23rd day of Feb 1923 Mark L Herron Asst. U. S. Atty Lodged Feb 23 1923 at —min. past —o'clock —M CHAS. N. WILLIAMS, Clerk Murray E. Wire, Deputy COOPER, COLLINGS & SHREVE Attorneys and Counselors 1011 Washington Bldg. Los Angeles, Cal. Phone 60277

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN
DIVISION.

UNITED STATES	)	Crim. No. 4253
)	
Plaintiff and respondent,)	
)	
-vs-	)	PETITION FOR
	)	APPEAL
CLARENCE E. LEWIS,)	
)	
Defendant and appellant.)	

Comes now the defendant Clarence E. Lewis, petitioner above named, and appellant herein, and says:

That on the 12th day of February, 1923, the above court made and entered its order denying appellant's motion for new trial and motion in arrest of judgment, in which orders, and on the trial of said action, certain errors were made to the prejudice of appellant herein, all of which will more fully appear in the assignment of errors and bill of exceptions herein to be prepared, and filed.

WHEREFORE, petitioner prays that an appeal be granted in his behalf, to the Circuit Court of Appeal of the United States, for the Ninth Circuit thereof, for the correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeal, for the Ninth Circuit thereof.

Dated at Los Angeles, California, February 23d 1923.

John S Cooper
Lewis D Collings
George H Shreve

Attorneys for Petitioner and Appellant

[Endorsed]: No. 4253 Crim IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION UNITED STATES, Plaintiff and respondent, -vs- CLARENCE E. LEWIS, Defendant and appellant PETITION FOR APPEAL Bledsoe, Filed Feb. 26 1923 at — min. past — o'clock —M CHAS. N. WILLIAMS, Clerk Murray E. Wire, Deputy COOPER COLLINGS & SHREVE Attorneys and Counselors 1011 Washington Bldg. Los Angeles, Cal. Phone 60277

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

UNITED STATES	) No. 4253 Crim
)
Plaintiff and respondent,)
	) ORDER ALLOWING
-vs-	) PETITION FOR
	) APPEAL
CLARENCE E. LEWIS,)
)
Defendant and appellant.)

On this the 26th day of February, 1923, came Clarence E. Lewis, by his attorneys, Messrs. Cooper, Col-

lings & Shreve, and having previously filed same herein, did present to this court his petition praying for the allowance of an appeal to the United States Circuit Court of Appeal for the Ninth Circuit, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent and transmitted to the United States Circuit Court of Appeal for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper;

NOW THEREFORE, on consideration thereof, this Court hereby allows the appeal hereby prayed for, and execution upon said sentence is hereby stayed, and said petitioner and appellant having moved for bond, his bond upon appeal is fixed and allowed herein in the sum of \$5000.00, which bond is to be given and approved by the Commissioner of this court. ~~And the court does further certify that all the evidence taken on the trial of said action, including the charge of said court, is incorporated in the bill of exceptions, settled and allowed by this court.~~ And that appellant give bond in the sum of \$250 for costs on appeal.

Dated at Los Angeles, California, February 26 1923.

Bledsoe

Judge

United States District Court

[Endorsed]: No. 4253 Crim. IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFOR-

NIA SOUTHERN DIVISION UNITED STATES,
 Plaintiff and respondent, -vs- CLARENCE E. LEWIS,
 Defendant and appellant. ORDER ALLOWING PE-
 TITION FOR APPEAL Filed Feb. 26 1923 at —
 min. past —o'clock —M CHAS. N. WILLIAMS,
 Clerk Murray E. Wire, Deputy. COOPER, COL-
 LINGS & SHREVE ATTORNEYS AND COUNSELORS 1011
 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277

IN THE DISTRICT COURT OF THE UNITED
 STATES FOR THE SOUTHERN DISTRICT
 OF CALIFORNIA, SOUTHERN
 DIVISION

UNITED STATES,	)	No. 4253 Crim.
Plaintiff and respondent,)	
-vs-	)	NOTICE OF APPEAL
CLARENCE E. LEWIS,)	
Defendant and appellant.)	

To the Clerk of the above-entitled Court, and to the
 Hon. Joseph C. Burke, United States District Attorney
 in and for the Southern District of California, and to
 said Court and the Hon. Benjamin F. Bledsoe, Judge
 thereof:

You and each of you will please take notice that
 Clarence E. Lewis, does hereby appeal to the Circuit
 Court of Appeals of the United States, for the Ninth
 Circuit thereof, from an order heretofore made on
 the 12th day of February, 1923, denying appellant's
 motion for new trial and motion in arrest of judgment,
 and from the judgment and sentence made therein
 and entered on said day.

Dated this 23d day of February, 1923.

Cooper, Collings & Shreve
Attorneys for Petitioner and appellant.

[Endorsed]: No. 4253 Crim IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION UNITED STATES, Plaintiff and respondent -vs- CLARENCE E. LEWIS, Defendant and appellant. NOTICE OF APPEAL Recd copy of within this 23rd day of February 1923 Mark L Herron Asst. U. S. Atty Filed Feb 23 1923 at — min. past — o'clock — M CHAS. N. WILLIAMS, Clerk Murray E. Wire, Deputy COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELLORS 1011 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

UNITED STATES,)	
Plaintiff and respondent,	)	ASSIGNMENT OF
-vs-	)	ERRORS
CLARENCE E. LEWIS,)	
Defendant and appellant.)	

Now comes the petitioner and appellant in the above-entitled action, and makes the following assignment of errors which he avers occurred in denying his motion for new trial and motion in arrest of judgment, and in the judgment and sentence herein.

I.

The court erred in denying his motion in arrest of judgment and motion for new trial; for the reason

(a) That the defendant was found not guilty upon the second count of the indictment, and the first count thereof does not charge a public offense.

(b) That the first count of said indictment does not charge any public offense for the reason that no offense could be charged in the language of said indictment.

II.

The court erred in making its rulings upon the receipt of evidence in this case, which rulings are numbered one to twenty nine, in the bill of exceptions hereby settled and allowed by this court.

III.

The court erred in charging the jury in this case, as shown by the bill of exceptions herein, exceptions numbered——to——

IV.

That the verdict is contrary to the law.

V.

That the verdict is contrary to the evidence.

VI.

That the verdict is contrary to the law and the evidence.

Respectfully submitted,

John S. Cooper

Lewis D Collings

George H Shreve

Attorneys for Petitioner and Appellant.

[Endorsed]: No. 4253 Crim. IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION UNITED STATES, Plaintiff and respondent, -vs- CLARENCE E. LEWIS, Defendant and appellant. ASSIGNMENT OF ERRORS Recd copy of within this 23rd day of February 1923 Mark L. Herron Asst U S Atty Filed Feb 23 1923 at —min. past —o'clock —M CHAS. N. WILLIAMS, Clerk Murray E. Wire Deputy COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELORS 1011 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

UNITED STATES,)	
Plaintiff and respondent,)	
-vs-	)	BOND ON APPEAL
CLARENCE E. LEWIS,)	
Defendant and appellant.)	

KNOW ALL MEN BY THESE PRESENTS:

That we, CLARENCE E. LEWIS, as principal, and Annie Earley and Walter Earley as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors

and administrators jointly and severally by these presents.

Sealed with our seals and dated this 23d day of February, 1923.

WHEREAS, on the 12th day of February, 1923, in the District court of the United States, in and for the Southern District of California, Southern Division, an order and decree was entered on the said day, denying appellant's motion for new trial and motion in arrest of judgment, and the said Clarence E. Lewis has obtained an order allowing an appeal by the said Clarence E. Lewis, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, in the City of San Francisco in the State of California, within thirty (30) days from and after the date of said citation, which citation has been duly served;

Now the condition of the above obligation is such that should any costs be adjudged against said Clarence E. Lewis, in said appeal, he and the sureties above named will pay to the United States of America such costs as may be adjudged against said Clarence E. Lewis, in said matter, not to exceed the sum of Two Hundred Fifty (\$250.00) Dollars.

(SEAL) Clarence E. Lewis

(SEAL) Annie Earley

(SEAL) Walter Earley

Approved:

Bledsoe

Judge of the District Court of the United States. Southern district of California, Southern Division.

SOUTHERN DISTRICT OF CALIFORNIA, SS

Annie Earley and Walter Earley being duly sworn, each for himself deposes and says that he is a householder in said District, and is worth the sum of Five Hundred (\$500.00) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Annie Earley

Walter Earley

SUBSCRIBED AND SWORN TO before
me this 23rd day of February, 1923

(Seal)

Lewis D Collings

Notary Public in and for the County of
Los Angeles, State of California.

The form of the foregoing Bond and the sufficiency of the sureties thereto is hereby approved.

Cooper, Collings & Shreve,

By John S. Cooper

Attorneys for appellant.

[Endorsed]: No. 4253 Crim. IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION UNITED STATES, Plaintiff and respondent, -vs CLARENCE

E. LEWIS, Defendant and appellant. BOND ON APPEAL Ward 110 Filed Feb 26 1923 at — min. past —o'clock —M CHAS. N. WILLIAMS, Clerk Murray E. Wire, Deputy COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELLORS 1011 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277

UNITED STATES OF AMERICA.

SOUTHERN DISTRICT OF CALIFORNIA, 11

KNOW ALL MEN BY THESE PRESENTS:

That we Clarence Lewis as principal, and David Cohen and Robert R. Cook as sureties, are held and firmly bound unto the United States of America, in the sum of Five Thousand (\$5,000) Dollars, to the payment of which, well and truly to be made, we jointly and severally bind ourselves, our executors and administrators, firmly by these presents. Witness our hands and seals at Los Angeles, in said District, this 5th day of March, A. D. 1923.

The conditions of the above obligation is such that, whereas, an indictment was filed against Clarence Lewis, charging him with a violation of the Harrison Narcotic Act, and thereafter, on the 7 day of February, 1923, he was convicted of said offense, and sentenced by said court to a term of imprisonment, and whereas, thereafter, a petition was filed by said Clarence Lewis, for an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and an order allowing said appeal was made, and pending said appeal the Court made an order fixing bail in the sum of Five Thousand (\$5,000) Dollars;

NOW THEREFORE, if said Clarence Lewis shall appear and render himself amenable to any and all lawful orders and process in the premises; and if said judgment of conviction be affirmed, or said appeal dismissed or not prosecuted, and said Clarence Lewis renders himself amenable to said judgment of conviction and renders himself in execution thereof, then this recognizance be void; otherwise to remain in full force and effect.

Clarence E. Lewis, (Seal)

David Cohen (Seal)

Robert R Cook (Seal)

SOUTHERN DISTRICT OF CALIFORNIA, SS

David Cohen and Robert R. Cook being duly sworn, each for himself deposes and says, that he is a householder in said District, and is worth the sum of Five Thousand (\$5,000.00) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Clarence E. Lewis. (SEAL)

Subscribed and Sworn) David Cohen (SEAL)
to before me this 5th) 4076 Leewood Ave
day of March, 1923) Robert R. Cook (SEAL)

1529 E 12th

Seal

Stephen G. Long.

United States Commissioner for
the Southern District of California

[Endorsed]: No. 4253 Crim. IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION UNITED STATES Plaintiff and respondent -vs- CLARENCE E. LEWIS Defendant and appellant. BOND ON APPEAL Approved Bledsoe J 3/5/23 Filed Mar 5-1923 at — min. past —o'clock —M CHAS. N. WILLIAMS, Clerk Murray E. Wire. Deputy COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELORS 1011 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

UNITED STATES,)	
Plaintiff and respondent,)	
-vs-	)	PRAECIPE
CLARENCE E. LEWIS,	)	(For transcript of
Defendant and appellant.)		record)

To CHARLES N. WILLIAMS, Clerk of the District Court of the United States, Southern District of California, Southern Division:

SIR:

Please make up transcript of appeal in the above-entitled case to be composed of the following papers:

1. Citation on appeal.

2. Copy of the indictment herein, together with a copy of your minutes concerning all the proceedings in this case.

3. Copy of the bill of exceptions herein.

4. Petition on appeal.

5. Order allowing appeal.

6. Notice of appeal.

7. Assignment of errors.

8. Praecipe.

9. Certificate of Clerk.

10. Bond on appeal.

Dated, February 23d 1923

Cooper, Collings & Shreve

Attorneys for Petitioner and Appellant.

[Endorsed]: No. 4253 Crim IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION UNITED STATES, Plaintiff and respondent, -vs- CLARENCE E. LEWIS, Defendant and appellant. PRAECIPE Filed Jul 9 1923 at —min. past —o'clock —M CHAS N. WILLIAMS, Clerk L. L. Aronson Deputy COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELORS 1011 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

United States,)
Plaintiff and Appellee)
vs.)
Clarence E. Lewis,)
Defendant and Appellant)

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 85 pages, numbered from 1 to 85 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the defendant-appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation on appeal; copy of the indictment, with a copy of the minutes concerning all the proceedings; copy of the bill of exceptions; petition on appeal; order allowing appeal; notice of appeal; assignment of errors; praecipe, and bond on appeal.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to and that said amount has been paid me by the plaintiff-in-error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of , in the year of our Lord One Thousand Nine Hundred and Twenty-three, and of our Independence the One Hundred and Forty-eighth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the
United States of America, in and
for the Southern District of California.

By

Deputy.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Clarence E. Lewis,

Appellant,

vs.

The United States of America,

Appellee.

APPELLANT'S OPENING BRIEF.

COOPER, COLLINGS, SHREVE & LEE,
Attorneys for Appellant.

Names and Addresses of Attorneys.

For Appellant:

COOPER, COLLINGS & SHREVE, 1011 Washington
Building, Los Angeles, Cal.

For Appellee:

JOS. C. BURKE, U. S. Attorney, Federal Building,
Los Angeles, California.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Clarence E. Lewis,

Appellant.

vs.

The United States of America,

Appellee.

APPELLANT'S OPENING BRIEF.

INTRODUCTION.

This is an appeal from a judgment of conviction against the defendant below, finding him guilty of a violation of section 1 and 8 of the Harrison Narcotic Act, and sentencing him to serve a term of four years at McNeil Island. [Rep. Tr. p. 27.]

The appellant was indicted under two counts; the first count charging that he did *deal in and distribute certain narcotics, without having registered and paid the tax*, as required by section 1 of the Harrison Narcotic Act; and the second, charging that he *did sell, barter, exchange and give away*, certain narcotics not in pursuance to a written order, and the said

defendant was a person required to register and pay the special tax (section 2 Harrison Narcotic Act). [Rep. Tr. p. 305.]

The jury returned a verdict of guilty on the first count, and not guilty on the second count [Rep. Tr. p. 22], and judgment was rendered accordingly, and sentence imposed.

STATEMENT.

The facts briefly show that certain police officers, of the City of Los Angeles, were approached by a notorious addict, one Morris, who told them that he knew where he could buy morphine. That pursuant to such information, the officers followed Morris to Eighth and Hemlock street, in the city of Los Angeles, where Morris met the defendant, another addict, at which meeting defendant had something in his hand. That upon the approach of the officers, the defendant tossed the something in his hand away, and upon the officers coming up, Morris still had his marked bills in his hand, and upon a search, the officers found a package which contained narcotics. Upon a further search of the defendant's room and trunk, they found other narcotics which were produced and offered in evidence. Morris was not produced as a witness upon the trial, and the officers were not able to testify as to any conversation between the defendant and Morris, but only as to the physical acts of the parties, as above enumerated. However, the defendant on his own behalf took the

stand, and testified that because of injuries received in the World War, he had become an addict, but he denied that he had any dealings or conversation with Morris concerning narcotics, and as well, produced reputable witnesses who testified as to his good moral character as a law-abiding citizen.

After the introduction of this evidence, among other instructions the court said:

“I do not think you need pay very much attention to the second count, because of the condition of the evidence. But the evidence is to the point that he was dealing in narcotics, and it is for you to say now what the worth and weight of that evidence is.” [Rep. Tr. p. 69.]

After such an instruction, needless to say, as above stated, the jury returned a verdict of guilty as to the first count, and not guilty as to the second.

During the course of the trial, the defendant duly objected and excepted to the introduction of the evidence concerning the exhibits [See bill of exceptions, Rep. Tr. p. 29 *et seq.*], and thereafter duly and regularly moved to vacate and set aside the verdict, and grant a new trial upon the grounds:

That the verdict is contrary to the law.

That the verdict is contrary to the evidence.

That the verdict is contrary to the law and evidence.

Errors of law occurring during the trial of the case, and duly excepted by the defendant.

That the court committed error by instructing the jury contrary to the law and the facts.

For such errors, the defendant-appellant now insists that the case should be reversed and remanded.

POINT I.

The Verdict Is Contrary to the Law and the Evidence.

Under sections 1 and 8 of the original Harrison Narcotic Act (Act Dec. 17, 1914, Ch. 1, 38 Stat. L, 787), it was provided that any person, who deals or dispenses, etc., narcotics shall register, and further, that any person not so registered, who possesses narcotics, shall be presumed to be guilty.

Under this law, the Supreme Court of this land was called upon to interpret such a statute, and in an able and exhaustive opinion, by a divided court decided as follows:

“A statute must be so construed, if fairly possible, as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. *United States v. Delaware & Hudson Co.* 213 U. S. 366.

This court cannot assume to know judicially that no opium is produced in this country; nor is it warranted in so assuming when construing a statute itself purporting to deal with producers of that article.

When Congress contemplates the production of an article within the United States, this court

must construe the act on the hypothesis that such production takes place.

An attempt of Congress to make possession of an article—in this case opium—produced in any of the states a crime, would raise the gravest question of power. *United States v. DeWitt*, 9 Wall. 41.

In construing a statute which calls itself a registration or taxing act and does not purport to be in execution of a treaty and which contains a provision not required by any treaty, a grave doubt arises whether such a statute is entitled to the supremacy claimed for treaties on the ground that it does in effect carry out existing treaty obligations on the general subject of both treaty and statute.

While the Opium Registration Act of December 17, 1914, may have a moral end, as well as revenue, in view, this court, in view of the grave doubts as to its constitutionality except as a revenue measure, construes it as such.

Every question of construction is unique, and an argument that might prevail in one case may be inadequate in another.

Only definite words will warrant the conclusion that Congress intended to strain its powers, almost if not quite, to the breaking point, to make a great proportion of citizens *prima facie* criminals by mere possession of an article.

The words “any person not registered” in section 8 of the Opium Registration Act of 1914, do not mean any person in the United States, but refer to the class dealt with by the statute—those required to register—and one not in that

class is not subject to the penalties prescribed by the statute. 225 Fed. Rep. 1003, affirmed."

United States v. Jin Fuey Moy, 241 U. S. 394.

See also

United States v. Denker, 255 Fed. 339;

United States v. Wilson, 225 Fed. 82.

After this decision, Congress amended section 1 of the Harrison Narcotic Act, but did not amend section 8 thereof. The question therefore is: Is the law of the case of U. S. v. Jin Fuey Moy, 241 U. S. 394, still the supreme law of this land, or has Congress, by a later act, amended it so as to give it a different meaning?

From a careful resume of all the authorities in the United States, we are unable to find where the Jin Fuey Moy case *supra*, has in any way been modified, and from a reading of this case, in conjunction with the facts and circumstances of this record, it clearly shows that the defendant-appellant was guilty of no offense.

The reason for the verdict however, is apparent from a careful reading of the record. As above pointed out, the defendant was charged with dealing and distributing, and a sale. At the close of the Government's case, counsel for the defendant moved to dismiss as to count 2, which motion was denied, but such error was possibly cured by the charge of the court directing to the jury to acquit on the second count, leaving standing alone, count one.

Under this count, it is specifically charged that the defendant *did deal and distribute*, in violation of section 1 of said Act, "*and the said Clarence Lewis was then and there a person required to register and pay the special tax under and by the above said Act, and section 1 thereof.*"

If the said Clarence Lewis was a person so required to register and pay said tax, under what law was he required to do so?

Under the Act itself, section 1, the persons required to register are importers, manufacturers, producers, compounders, wholesale dealers, retail dealers, physicians, dentists, veterinary surgeons, and other practitioners, lawfully entitled to distribute, dispense or give away any of the aforesaid drugs to patients upon whom they, in the course of their professional practice, are in attendance.

Following such classification it is stated:

"Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs shall be deemed to be an importer, manufacturer, or producer.

Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a retail dealer."

Now, clearly, the defendant-appellant does not come under any of these classifications.

For as was said by Justice Holmes in the case of *U. S. v. Jin Fuey Moy*, 241 U. S. 402:

“Approaching the issue of this point of view, we conclude that ‘any person not registered cannot be taken to mean any person in the United States; he must be taken to refer to the class with which the statute undertakes to deal—the persons who are required to register by section 1.’”

As above set forth, section 8 above quoted has not been amended, regardless of such fact, however, the court charged the jury that the defendant did not register, and that possession was presumptive evidence of guilt.

Before the defendant was required to register, he must have been a person referred to in the classes above enumerated, and the only class with which he was charged was being one who “deals in and distributes.”

The word “deal” has been defined in the case of *Foreman v. U. S.* 255, Fed. 623, as follows:

“To dispense is to deal out or divide out generally; to distribute is to deal or divide out in proportion or in shares. These words also connote ownership, possession, or control, actual, apparent, or pretensive, in the dispenser for himself or another, and the voluntary parting with the possession, ownership, or control; but the general allegation of dispensing or distribution would not indicate whether the voluntary part-

ing with possession, ownership, or control was by selling, or bartering, or exchanging, or giving. Hence, if the indictment had charged only distribution and dispensing, the words would be too general to indicate with certainty whether the particular statutory offense charged was sale or barter or exchange or gift of the drug."

See also

U. S. v. Lowenthal, 257 Fed. 444.

While generally speaking "deal" means to transact business; to trade; to trade in the selling of a thing; to make a business of it; to traffic; to traffic in, etc.

To deal in a commodity is to negotiate or make bargains in respect to that commodity, to traffic therein as buyer or seller.

17 *Corpus Juris*, 1153, and cases therein cited.

"And further—although a man commences to be a dealer from the moment when he buys the article with an intention to sell it again, the term implies a habitual course of dealing, and usually is employed to designate one who makes a business of buying and selling—one whose business it is to buy and sell, a merchant, shop-keeper, or broker, a trader, one who makes successive sales as a business, a person who seeks his living by buying and selling, a person engaged in the business of buying and selling merchandise, or other personal property in the usual course of trade."

Under the case of United States v. Lowenthal, 257 Fed. 444, count one of the indictment clearly charges

the defendant with but one offense, and that is that he did deal in and distribute narcotics, without having registered and paid the tax, and he being a person then required to register.

In the case of *Hosier v. United States*, 260 Fed. 155, the distinction is clearly made between sections 1 and 8, and section 2, and it is there pointed out that one who makes a single sale may be guilty under section 2, but that so far as 1 and 8 are concerned, such sections only apply to one making a business of dealing in such a commodity.

In the case at bar the evidence failed to show a sale, and the court so instructed the jury, and likewise there is an entire absence of proof that the defendant-appellant ever did deal in or dispense any narcotics, but only showed that he possessed some, being a user thereof.

The verdict is therefore contrary to the law and the evidence.

POINT II.

Insufficiency of the Evidence as Applied to the Charge.

On the question of possession the court instructed the jury as follows:

“The possession of drugs is presumptive evidence that the person is engaged in the business of dealing in or distributing such drugs. And any person who violates or fails to comply with any of the require-

ments of this Act shall upon conviction be punished, etc.” [See transcript page 68, Par. 4.]

Further along in his charge he instructed the jury relative to dealing in narcotics as follows:

“To deal in narcotics does not necessarily imply that there must have been a sale. A man dealing in a thing has to offer it for sale and has to have it ready for sale. Now, it is obvious here in this case under the evidence that no sale was consummated, etc.” [Tr. p. 69.]

The expressions taken by themselves would not have any effect on the average normal mind, but in a case of this nature the two parts of the charge quoted above when coupled together is tantamount to his saying: That while he is charged as a dealer, and there is no evidence of his dealing or selling, if you believe he had the drugs in his possession, then the mere fact that he may have had drugs in his possession raises a presumption in your mind strong enough to justify a conviction. This charge is fatal for the following reasons:

1. That the bare possession of narcotics is not presumptive evidence that the person is engaged in the business of dealer.

“Evidence that the defendants charged as unlawful dealers in narcotics several months before in another district, had considerable quantity of morphine in their possession, held incompetent, where it was shown that they were habitual users of the drug.” *Paris v. United States*, 260 Fed. 529.

In the above case it was shown that the defendant had in his possession twenty-six bottles of morphine and the court in reversing that case said:

“If, upon this evidence, a jury could find that these defendants had the intent to carry on the business of dealers in morphine in Oklahoma City or elsewhere, it would be the duty of the judge on receipt of such finding to set aside, for there would be no substantial evidence here to sustain it.”

Without evidence of evil intent no presumption against the defendant could possibly arise except the erroneous importance attached to such a presumption by the trial judge in his charge. The record shows that this defendant as a habitual user of drugs and under the Paris case *supra* he should not have been convicted except upon clear and certain proof.

2. Because the evidence fails to show any sale or dealing in narcotics at the time of his arrest or at any other time or place, but on the other hand it is admitted by the court in his charge that no narcotics were sold.

3. Because no proof or evidence was produced at the trial to show that the exhibits introduced to be the property of the defendants, were never identified as the property of the defendants, nor would they have been evidence had they been so identified.

Boyd v. United States, 142 U. S. 454; 12 Sup. Ct. 292; 35 Law Ed. 1077;

Hall v. United States, 150 U. S. 76; 14 Sup. Ct.
22, 37 Law Ed. 1003;
16 C. J. p. 586, Sec. 1133.

At the very strongest, the evidence introduced by the United States but creates a suspicion. The circumstances surrounding this whole transaction and all the facts introduced in evidence make but a feeble case at best. It has been held that evidence of similar acts or remotely relating circumstances, "of a vague and uncertain character" regarding such alleged offense is never admissible because it tends to draw the attention of the jury away from the consideration of the real issues on trial to fasten it upon other questions and to cause them to render their verdict according to their views on false issues rather than on the true issues on trial.

Baxter v. State, 91 Ohio State 167, 110 N. E.
546;

State v. Hyde, 234 Mo. 200; 136 S. W. 316,
Annot. Cases 1912 D. 191; 16 C. J. 592;

People v. Shark, 107 N. Y. 427; 14 N. E. 319,
1 Am. St. Rep. 861;

State v. LaPage 57 N. H. 245; 24 Am. Rep.
69;

Fish v. United States 215 Fed. 545; 132 C. C.
A. 56; L. R. A. 1915 A. 809;

Paris v. United States, 260 Fed. 529, Par. 1.

It is manifest here that the jury could not have convicted save for that part of the charge relating to possession.

4. Because the intent of the defendant was not an essential element of the offense with which they were charged in the case involved, after a sale or an attempted sale was not shown, since the evidence of the case before us is barren of any proof of a sale or even attempted sale or even an intended sale. There was no such evidence as will be required to sustain the conviction.

This indictment charged but one crime, that was that the defendant did "deal in and distribute" said narcotics.

It is one thing to deal in narcotics and another to have them in your possession. This defendant was not indicted for having drugs in his possession unlawfully and the question of possession should not have been allowed to go to the jury when the case of the United States fell down on the question of a sale or dealings. In other words the defendant was charged with one distinct crime in the indictment, his defense had prepared his defense along the lines of the crime alleged in the indictment, but the learned trial judge admitted proof of possession, and failed to exclude it from the jury after the prosecution had failed to connect said possession with a sale or an attempted sale, but on the other hand the jury was instructed very emphatically on the question of possession and as said above the minds of the jurors were so taken from the true issues in the case, to wit; the dealing in drugs, that it can safely be said that defendant was convicted on the theory of possession alone. The charge left the jury

no proper guide for weighing the evidence when considering and deliberating on the verdict. This question was very seriously considered in the case of *Fish v. United States*, 215 Fed. 544 *et seq.*, and the court's charge to the jury in that case, which is almost the same language as that employed in this case, was held on appeal to have been a fatal error. In that case the court charged as follows:

"Now, in order to show that the fire was incendiary and not accidental, I have permitted certain evidence to be received about other fires. Now, this does not impose upon the jury the duty of trying the defendant for these other fires. It is not offered and it could not be offered for the purpose that he had burned the Senta and that he had burned an automobile, and therefore, you might be more readily induced to believe that he burned the yacht. This is not the purpose of this evidence and that is not what it is offered for or what it could be admitted for. It is for the purpose of showing that the fire was not accidental but was incendiary. The Government is not bound to prove and has not undertaken to prove that the defendant set fire to the yacht Senta, or to his automobile. If you are satisfied that those fires occurred you may use that fact, and the fact of any condition or assistance attempted or surrounding either or both of them, etc."

The appellate court in reviewing that charge said: (see page 550):

“The court told the jury that they might use the fact of over insurance in the case of the first yacht and of the automobile, that they might use the fact of the defendant’s financial condition or any of the other facts, some of which were that the defendant had his cousin shortly before to fire the automobile in the barn, procuring a permit from the insurers of the barn to keep the automobile in it, etc.”

The pertinent injury which suggests itself on reading this instruction is, what relevance has any of these facts on any question other than the very one on which the court instructed the jury.

In the case at bar, after the Government had failed to show that a sale was even being contemplated, the question of possession then became irrelevant and should have been stricken out of the record, because the defendant was not being tried for possession and the charge in the indictment of his being a “dealer” of necessity fell with the proof. The only doubtful question in this case which could have been submitted the jury under the indictment was whether or not the defendant was dealing in narcotics and in all candor we submit that there is no evidence in the record to justify the conclusion that the defendant in any wise was a dealer.

The court practically told the jury that they might use the evidence of possession and convict the defendant whether a sale or attempted sale was made or not. Thus, it is patent that defendant was convicted be-

cause, he an addict, was alleged by the officers to have thrown a package away which is said to have contained narcotics.

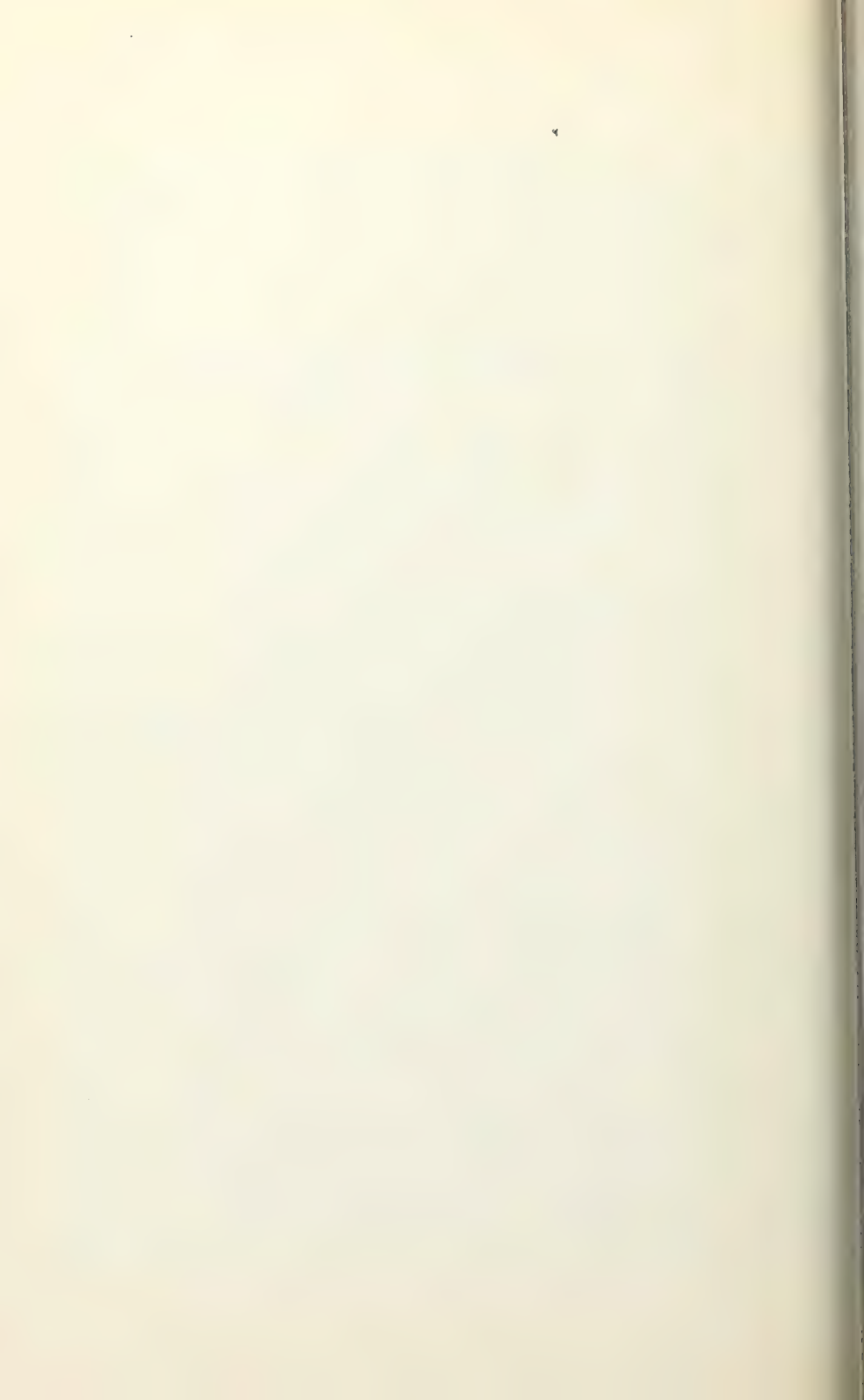
CONCLUSION.

It therefore appears from the foregoing, that the evidence in this case is insufficient to justify the verdict, because there is no legal evidence in the record upon which this defendant can be convicted, and the court clearly erred in denying the defendant-appellant's motion for a new trial, from which we conclude that the case should be reversed and remanded, and a new trial granted to the defendant-appellant.

Respectfully submitted,

COOPER, COLLINGS, STREVE & LEE,

Attorneys for Appellant.



IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Clarence E. Lewis,

Appellant,

vs.

The United States of America,

Appellee.

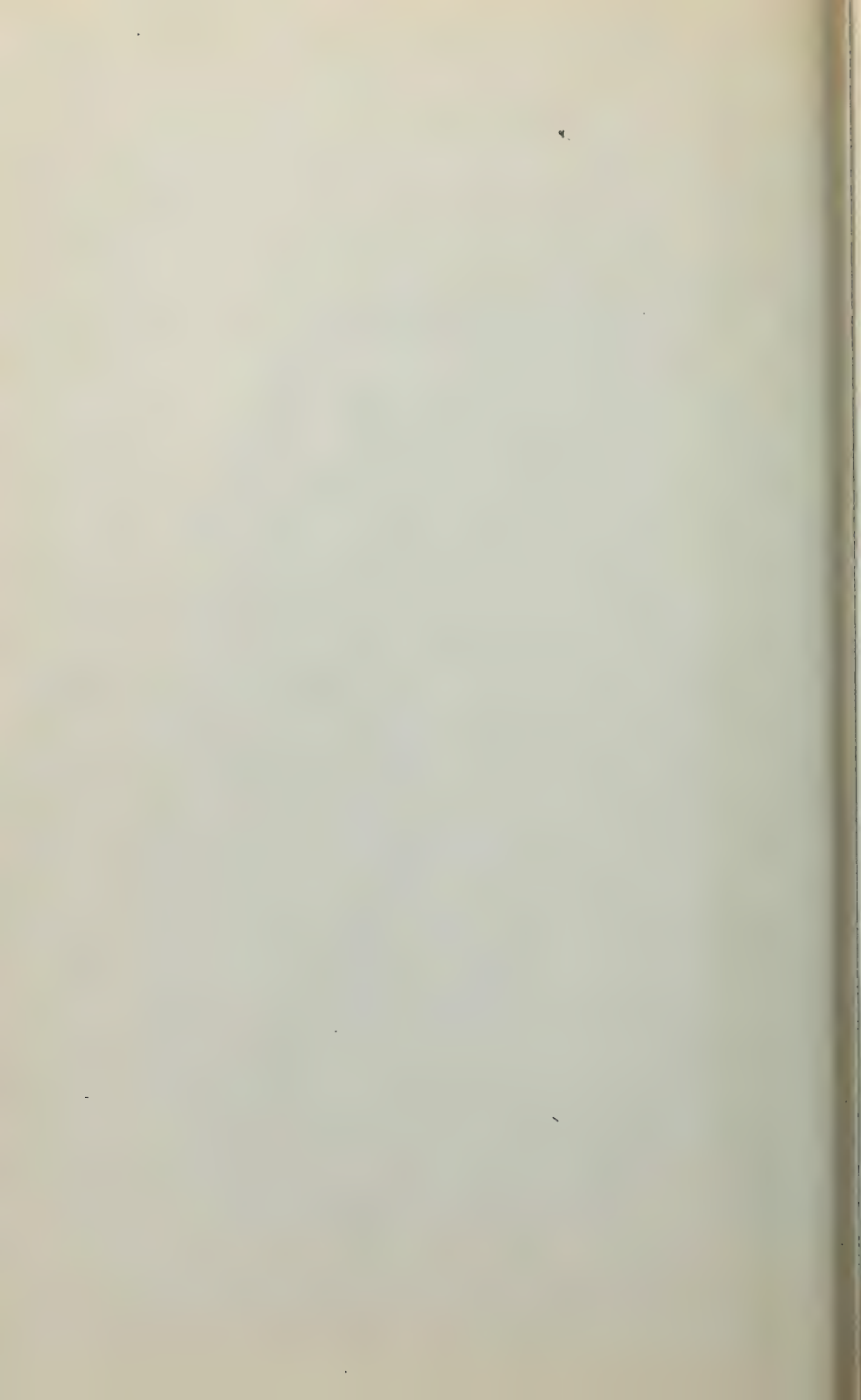
BRIEF OF APPELLEE.

JOSEPH C. BURKE,

United States Attorney.

ROBERT B. CAMARILLO,

Assistant United States Attorney.



IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Clarence E. Lewis,

Appellant,

vs.

The United States of America,

Appellee.

BRIEF OF APPELLEE.

Appellant's opening brief raises two questions for consideration:

1. That the verdict is contrary to the law and the evidence;
2. That the evidence is insufficient as applied to the charge.

Taking these up in the order in which they appear we find first, that appellant was indicted for violation of the Harrison Narcotic Act in that he did "deal in and distribute certain narcotics without having registered and paid the special tax, etc., being then and there a person required to register and pay such special tax."

I.

Appellant complains that he was not a person required to register under the act, unless he could be considered a "retail dealer"; and that he was only charged with a sale of narcotics in count 2 of the indictment, on which count he was acquitted.

"Where the indictment charged that the defendants were persons required to register, and that they unlawfully had certain drugs in their possession, it is not necessary to negative an innocent possession by alleging that defendant's possession was for purpose of a sale."

U. S. v. O'Hara, 242 Fed. 749, T. D. 2392.

"The act applies to all sellers, not only to registered dealers."

Fyke v. U. S., 254 Fed. 225.

At this point it might be well to call the attention of the court to certain errors which are apparent in appellant's opening brief. In his statement of the case he alleges that one Morris (the police informant in the particular case) was a "notorious addict" [Trans. p. 6, l. 10], and also that appellant was an addict to the use of drugs [Trans. p. 6, l. 14 and p. 7, l. 2]. A careful reading of the transcript shows that there is no foundation for either of these statements, for there was absolutely no evidence submitted to the jury to support either of these allegations.

Conceding that mere possession alone of narcotics under the act is not a crime, yet if coupled with evi-

dence of dealing or distributing it does become an offence.

The act itself makes possession a presumption that such possessor is engaged in the business of dealing, and such presumption should be considered by the jury with all the other evidence in the case.

The Jin Fuey Moy case, 241 U. S. 402, is not in point for there defendant was charged with "possession" alone, and NOT with "dealing and distributing" in addition.

II.

The second question raised in appellant's brief, viz.: the insufficiency of the evidence as applied to the charge, can be answered point by point.

1. Appellant contends that the bare possession of narcotics is not presumptive evidence that the person is engaged in the business of dealer.

The act itself declares that "such control (possession) shall be presumptive evidence of a violation of this section (Sect. 8) and also a violation of the provisions of section 1 (forbidding dealing in and distributing)."

2. Appellant contends that the evidence fails to show any sale, and alleges that the court admits in its charge that there was no sale.

The testimony of the two police officers, who were witnesses for the government, was to the effect that informant went to appellant's home; that he had

marked money in his hand at the time of the arrest; (both of which points appellant admits) and that appellant had in his hands the package containing the narcotics. [Trans. p. 12, l. 3 *et seq.* and p. 33, l. 1 *et seq.*]

The court instructed the jury that no sale was consummated [Trans. p. 88, l. 3]; but did instruct them that "the evidence is to the point that he was *dealing* in narcotics." [Trans. p. 88, ll. 7-8.]

3. The point raised by appellant that no proof was introduced that the exhibits introduced were ever the property of the appellant, we deem too trivial to be worthy of consideration.

4. The question of "intent" has been settled by the Supreme Court in *U. S. v. Ballint*, decided March 27, 1922, #480, in which the opinion was rendered by Mr. Chief Justice Taft, holding that whether scienter is essential to statutory crime is a question of legislative intent; and that the sale of narcotics is an offence though the seller is ignorant of the character of the drug.

The appellant was fairly tried; the jury fairly and impartially instructed, and it is respectfully submitted that, there being no error in the record, the case should be affirmed.

JOSEPH C. BURKE,
United States Attorney.

ROBERT B. CAMARILLO,
Assistant United States Attorney.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Clarence E. Lewis,

Appellant,

vs.

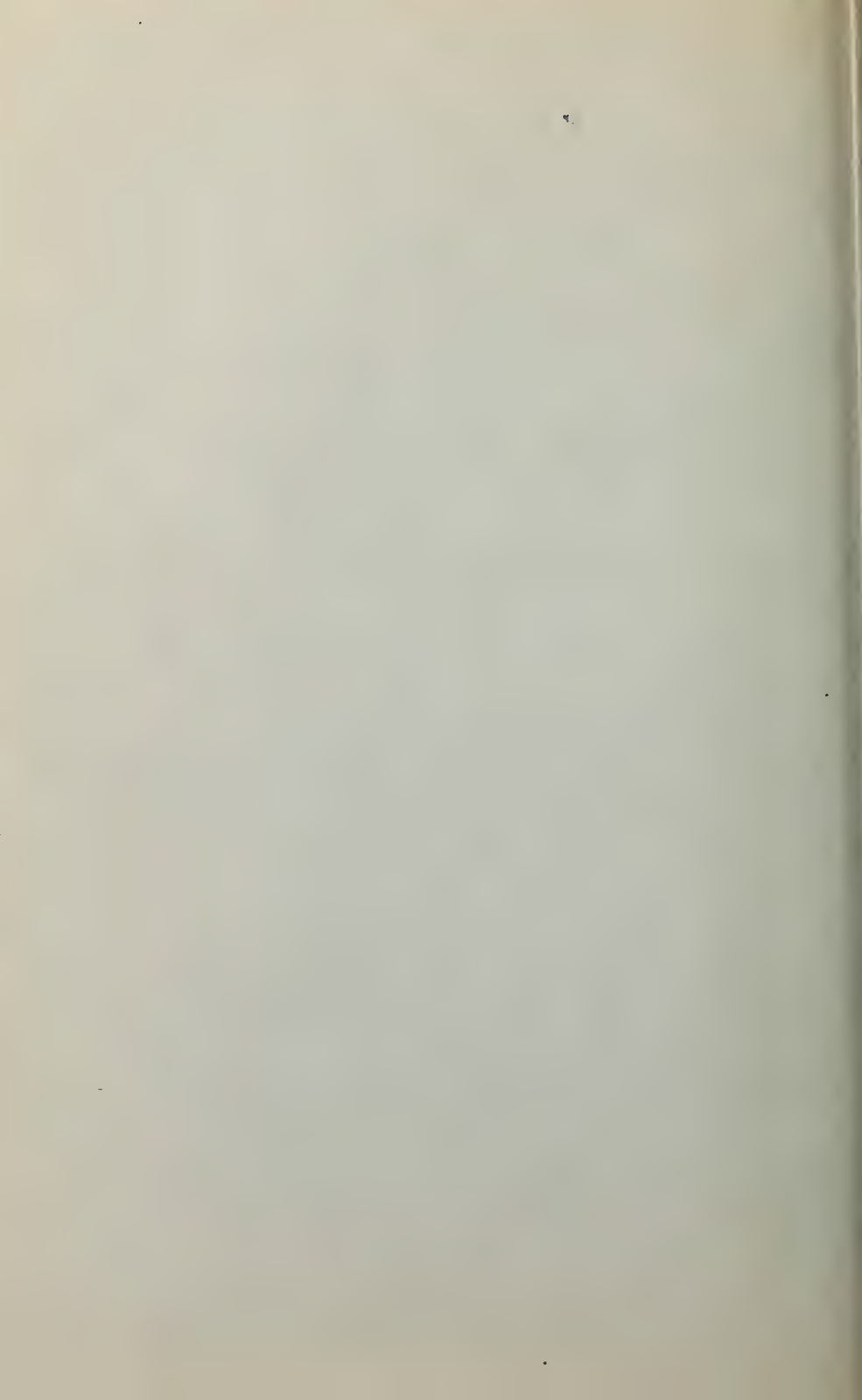
The United States of America,

Appellee.

APPELLANT'S REPLY BRIEF.

COOPER, COLLINGS & SHREVE,

Attorneys for Appellant.



IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Clarence E. Lewis,

Appellant,

vs.

The United States of America,

Appellee.

APPELLANT'S REPLY BRIEF.

In the case at bar, in our opening brief, we set forth two points upon which we sought a reversal. First, that the verdict was contrary to the law and the evidence; and, second, insufficiency of the evidence as applied to the charge.

In reply to these points, the appellee contends that sections one and eight of the Harrison Narcotic Act apply to all persons alike, and cites in support thereof 242 Fed. 749, and 254 Fed. 225, but such is not our interpretation of the statute in question, and we again refer to the cases cited in our opening brief. Under the *Jin Fuey Moy* case, 241 U. S. 402, the only persons required to register are those who engage in the business of dealing in or prescribing narcotics, and likewise, under the Federal law, the mere possession of narcotics alone is no offense. Now, either this is or

is not the law, and the cases which bear such contention out are

U. S. v. Jin Fuey Moy, 241 U. S. 394, and
U. S. v. Hosier, 260 Fed. 155 (4 C. A. C.).

The defendant in this case was charged with two offenses—first, that of selling narcotics, of which offense he was acquitted; and second, that of dealing in narcotics without having registered as required by law, and upon which count he was found guilty.

Now, having been acquitted of the sale, the only question for consideration is, Did he deal in and dispense drugs? The District Attorney contends upon this point that in cases of this character, under section eight, all the Government has to do is to show possession, and that such being the case, the presumption arising from such fact is sufficient to convict. If such is the law, clearly the decision in the case of United States v. Wilson, 225 Fed. 82, is not the law, for in that case the facts are similar to the case at bar.

As to point two, the defendant contends that the evidence is insufficient as applied to the charge. In addition to the other cases cited by us, we wish simply to add the case of

Stokes v. U. S., 264 Fed. 18,
in which it was held that an unfair charge upon the evidence adduced is a ground for a reversal.

Upon which we conclude that the case should be reversed and remanded.

Respectfully submitted,
COOPER, COLLINGS & SHREVE,
Attorneys for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARTIN ROZEMA, Assignee of the Judgment of
the HALE COMPANY, a Corporation,
Against the INTERNATIONAL TRADING
COMPANY, a Corporation,
Plaintiff in Error,
vs.

NATIONAL CITY BANK OF SEATTLE, a Na-
tional Banking Corporation, Garnishee,
Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.**

FILED



No. 4072

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARTIN ROZEMA, Assignee of the Judgment of
the HALE COMPANY, a Corporation,
Against the INTERNATIONAL TRADING
COMPANY, a Corporation,

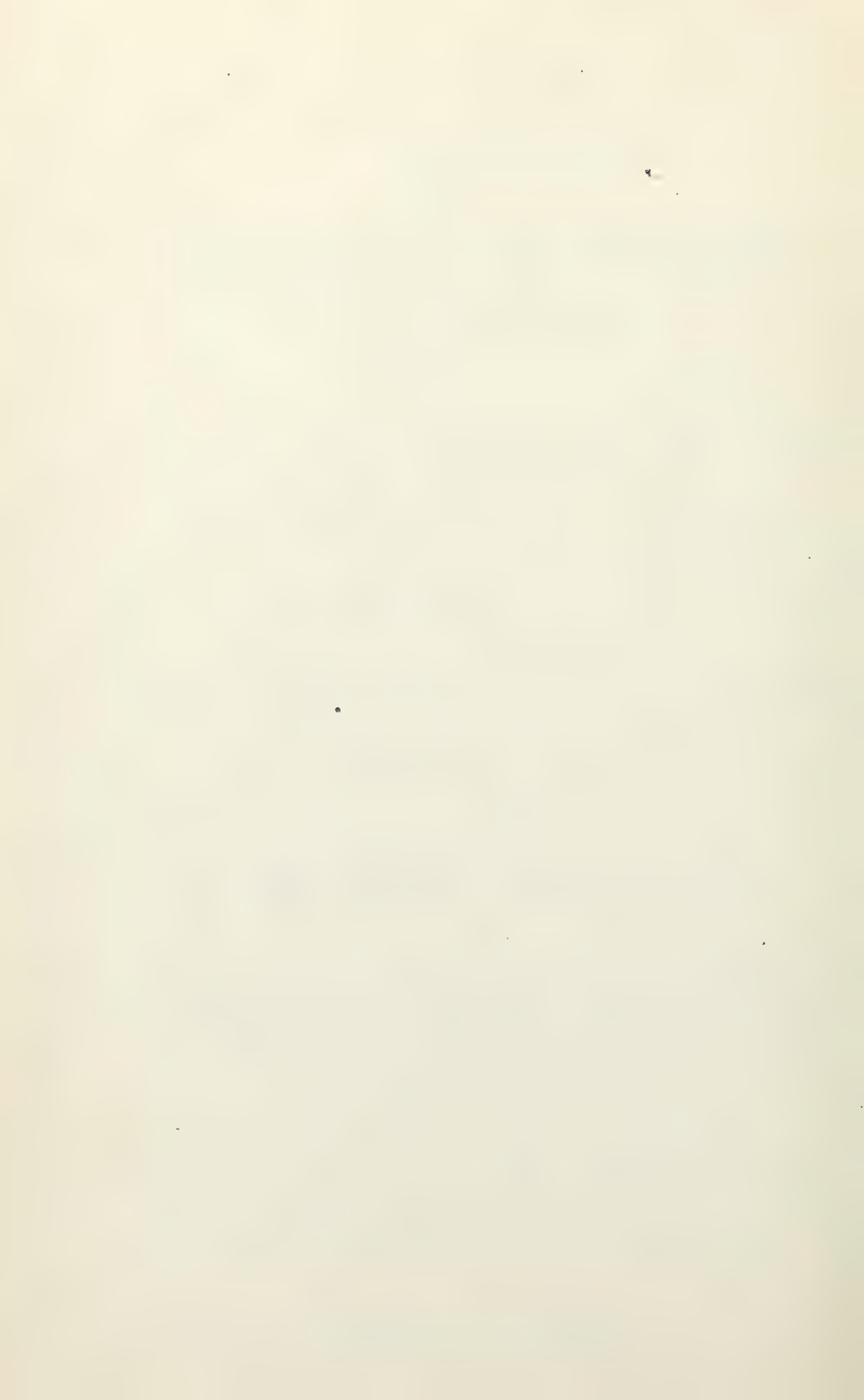
Plaintiff in Error,

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NATIONAL CITY BANK OF SEATTLE, a Na-
tional Banking Corporation, Garnishee,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

MESSRS. HADLEY, HAY & HADLEY, Attorneys for Plaintiff in Error, 375 Colman Building, Seattle, Washington.

MESSRS. BAUSMAN, OLDHAM, BULLITT & EGGERMAN, Attorneys for Plaintiff in Error, 1408 Hoge Building, Seattle, Washington.

ALMON RAY SMITH, Esq., Attorney for Defendant in Error, 822 Second Avenue, Seattle, Washington.

MESSRS. POE, FALKNOR & FALKNOR, Attorneys for Defendant in Error, 405 New York Block, Seattle, Washington. [1*]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 5003.

THE HALE COMPANY, a Corporation,
Plaintiff,

vs.

INTERNATIONAL TRADING COMPANY OF
AMERICA, Inc., a Corporation,
Defendant.

Judgment.

This cause came regularly on for trial on the 18th day of June, 1920, before the Hon. E. E. Cushman,

*Page-number appearing at foot of page of original certified Transcript of Record.

Judge of the above-entitled court, sitting without a jury, a jury in said cause having been waived by the parties hereto as shown by the stipulation of said parties on file herein, the plaintiff appearing by N. A. Eisner and Walter A. McClure, its attorneys, and the defendant appearing by John W. Heal, Jr., and J. N. Hamill, its attorneys, whereupon witnesses were duly called and sworn and duly testified in behalf of the respective parties, and documentary proof was offered and received and said cause argued and submitted to the Court, and findings of fact and conclusions of law having been heretofore duly entered accordingly,

NOW, THEREFORE, it is by the Court Ordered, Considered and Adjudged that the plaintiff, The Hale Company, a corporation, have and recover of and from the defendant International Trading Company of America, Inc., a corporation, the sum of Fifty-two Hundred Dollars with interest at the rate of six per cent per annum from date hereof and costs to be taxed.

Done in open court this 7th day of July, 1920.

EDWARD E. CUSHMAN,

Judge. [2]

[Endorsements]: Filed Jul. 7, 1920. [3]

Affidavit for Garnishment.

[Caption and Title.]

United States of America,
Western District of Washington,—ss.

Walter A. McClure, being first duly sworn on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled cause and makes this affidavit on plaintiff's behalf for the purpose of obtaining the issuance of a writ of garnishment herein; that heretofore and on to wit the 7th day of June, 1920, in the above-entitled court in the above-entitled cause duly rendered and entered judgment in favor of The Hale Company, a corporation, plaintiff above named and against the International Trading Company of America, a corporation, the defendant above named in the sum of Fifty-two Hundred Dollars (\$5200.00) with interest at the rate of six per cent (6%) per annum from said June 7, 1920, and costs taxed in the sum of Forty-five and 02/100 (\$45.02). That no part thereof has been paid and that said judgment is wholly unsatisfied. That plaintiff and this affiant have reason to believe and do believe that the National City Bank of Seattle, a corporation, Geo. S. Bush & Co., a corporation, Frank Waterhouse & Company, a corporation, the Oregon & Washington Railway & Navigation Company, a corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, each are indebted to the defendant and each of them has in its possession and

under its control personal [4] property and effects belonging to the defendant. '

WHEREFORE affiant in behalf of said plaintiff demands that said National City Bank of Seattle, a corporation, Geo. S. Bush & Co., a corporation, Frank Waterhouse & Company, a corporation, the Oregon & Washington Railway & Navigation Company, a corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, and each of them be summoned to appear and answer as garnishees herein.

WALTER A. McCLURE.

Subscribed and sworn to before me this 22d day of July, A. D. 1920.

[Notary Seal] NELSON W. PARKER,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsements]: Filed Jul. 22, 1920. [5]

[Caption and Title.]

Writ of Garnishment.

United States of America,
Western District of Washington,—ss.

The United States of America to National City Bank of Seattle, a corporation, Geo. S. Bush & Company, a corporation, Frank Waterhouse & Company, a corporation, Oregon & Washington Railway & Navigation Company, a corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation,

WHEREAS in the above-entitled court in the above-entitled cause wherein The Hale Company, a corporation, as plaintiff, and the International Trading Company of America, a corporation, as defendant, the plaintiff did on the 7th day of June, 1920, recover judgment against the defendant in the sum of Fifty-two Hundred Dollars (\$5200.00) besides interest from June 7, 1920, at 6% per annum and costs of suit taxed in the sum of Forty-five and 02/100 Dollars (\$45.02) which judgment is wholly unsatisfied and has applied for writ of garnishment against you.

NOW, THEREFORE, you and each of you are commanded to be and appear before the said court within twenty days after the service upon you of this writ, if served within the county aforesaid, and within thirty days after the service of this writ upon you, if served in any other county in the State, then and there to answer upon oath in what amount, if any you are indebted to the [6] said International Trading Company of America, a corporation, *an* and were when this writ was served upon you, and what effects, if any, of the said International Trading Company of America, a corporation, you had in your possession or under your control and had when this writ was served upon you.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, and the seal of said District Court hereto affixed this 22d day of July, A. D. 1920.

F. M. HARSHBERGER,

[Seal U. S. District Court]

Clerk.

Marshal's Return.

I hereby certify and return that I served this writ on F. D. Hoffeditz, Assistant Agent, U. P. Dock at Seattle, Washington on July 22, 1920 at 1:10 P. M. on S. R. Bryan, Assistant Local Freight Agent, Chicago, Milwaukee Ry. Co., at Seattle, Washington July 22, 1920 at 1:30 P. M. on H. I. Hoskins, Secretary and Treasurer of the George S. Bush and Company, at Seattle, Washington on July 22, 1920 at 1:45 P. M. on J. W. Maxwell, President of the National City Bank at Seattle, Washington, July 22, 1920 at 2:00 P. M. and on N. H. Begley, Vice-President of the Frank Waterhouse Company, at Seattle, Washington July 22, 1920 at 2:15 P. M. by handing to and leaving with each of the above-named parties a true copy of this writ.

JOHN M. BOYLE,
United States Marshal.

By E. R. Tobey,
Deputy U. S. Marshal.

Marshal's fees 10.12.

[Endorsements]: Filed Jul. 27, 1920. [7]

[Caption and Title.]

Answer of Garnishee Defendant.

NOW COMES THE NATIONAL CITY BANK, of Seattle, a national banking association, one of the garnishee defendants of the above-entitled action and for answer to the Writ of Garnishment hereto-

fore issued and served upon it in said action, denies that it was at the time of the service of said writ or at any time since has been or is now indebted to the above-named defendant in any amount whatsoever and denies that it had at the time of the service of said writ or at any time since has had or now has any effects of said defendant in its possession or under its control except and unless it should be determined that said defendant is entitled to or may become entitled to an interest in the fund or property hereinafter referred to.

Further answering said writ, this garnishee defendant alleges as follows:

I.

That this garnishee defendant is a national banking association organized and existing under and by virtue of the acts of Congress relating to national banks and engaged in the banking business in the City of Seattle, Washington.

II.

That heretofore and on May 17, 1920, this garnishee defendant issued to Kelley & Co. Ltd., of Hong Kong, China, its certain letter of credit wherein and whereby this garnishee defendant engaged and agreed to honor drafts not exceeding Four Hundred Three Thousand Two [8] Hundred Dollars (\$403,200.00) in payment of the cost of certain granulated sugar which said letter of credit was issued at the request of, for the account of, and guaranteed by Frank Waterhouse & Co. of Seattle, Washington, a copy of same with endorsements thereon including said guaranty being hereto

attached, marked Exhibit "A," and by this reference made a part hereof as fully as though copied at length herein.

III.

That thereafter and in pursuance of the issuance of said letter of credit, said Kelley & Co. Ltd. of Hong Kong, China, shipped and consigned to its own order at Seattle, Washington, a quantity of granulated sugar with instructions to the carrier to notify International Trading Company of America, a corporation of Seattle, Washington. That said sugar reached Seattle on July 16, 1920, thereafter, and on July 23, 1920, this garnishee defendant paid the draft of Kelley & Co. Ltd. drawn under said letter of credit in the sum of Two Hundred Forty-four Thousand Nine Hundred Seventy Dollars and Forty-six Cents (\$244,970.46) and paid duty on said sugar in the sum of Fifteen Thousand Four Hundred Forty-one Dollars and Thirty-one Cents (\$15,441.31).

IV.

That this garnishee defendant is informed and believes and therefore alleges upon such information and belief that said sugar was sold through the joint efforts and agencies of said Frank Waterhouse & Co. and said International Trading Company of America, and one C. F. Buelow, doing business under the trade name of C. F. Buelow Co., all of Seattle, Washington, to Montgomery, Ward & Company of Chicago, Illinois, and John Sexton & Company of Chicago, Illinois, in definite portions and said sugar was immediately upon its arrival in

Seattle shipped and consigned by said International Trading Company of America to its own order at Chicago, Illinois, with instructions to notify Montgomery, Ward & Company and John Sexton & Company, and that the order bills of lading then issued to said International Trading Company of America by the carrier, were immediately endorsed, transferred [9] and delivered to this garnishee defendant by said International Trading Company of America.

V.

That this garnishee defendant has received from said Montgomery, Ward & Company of Chicago, Illinois, the sum of Two Hundred Thirty Three Thousand Nine Hundred Seventy Dollars and Fifty-two Cents (\$233,970.52) in full payment for the quantity of sugar sold to it, but that said John Sexton & Company has failed and refused and does refuse to pay for the quantity of sugar sold to it, the contract price for which was and is the sum of Thirty Nine Thousand Ninety-Two Dollars and Twenty-five Cents (\$39,092.25).

VI.

That on July 3, 1920, this garnishee defendant loaned to said International Trading Company of America the sum of Five Hundred Dollars (\$500.00) evidenced by its promissory note for that amount due July 15, 1920, with interest from maturity at the rate of eight per cent (8%) per annum, secured by an assignment of its claim to and an order on said Frank Waterhouse & Co. for any funds due said Trading Company upon the final division of

the proceeds of said sugar, a copy of said note and said assignment and order being hereto attached, marked Exhibit "B," and by this reference made a part hereof as fully as though copied at length herein.

VII.

That after the application of the proceeds of the sale to said Montgomery, Ward & Company to the payment of the amount advanced and paid to said Kelley & Co. Ltd., for the quantity of sugar sold to said Montgomery, Ward & Company, together with duty charges, commissions and interest, there remained and still remains in the hands of this garnishee defendant an excess amount of Ten Thousand Six Hundred Seventy-three Dollars and Twenty-six Cents (\$10,673.26), and there is still due this garnishee defendant for funds advanced and paid to said Kelley & Co. Ltd., in payment for the quantity of sugar sold to John Sexton & Company, as aforesaid, together with duty charges, interest, commission [10] and disbursements, the sum of Thirty-seven Thousand One Hundred Twenty-four Dollars and Eighty-one Cents (\$37,124.81), together with interest thereon at the rate of eight per cent (8%) per annum from July 23, 1920, and also the sum of Five Hundred Dollars (\$500.00) loaned to International Trading Company of America, as aforesaid, together with interest thereon at the rate of eight per cent (8%) per annum from July 15, 1920, until paid, all of which is secured by the excess fund of Ten Thousand Six Hundred Seventy-three Dollars and Twenty-six Cents (\$10,673.26)

hereinabove referred to, the title to the quantity of sugar intended for said John Sexton & Company under the order bills of lading and the guaranty of said Frank Waterhouse & Co. hereinabove referred to.

VIII.

That upon disposal of the sugar intended for John Sexton & Company, as aforesaid, the proceeds will be applied toward the payment of the amounts due this garnishee defendant as hereinabove set out, and the balance, if any there be, will unless otherwise ordered by this Court, be paid to said Frank Waterhouse & Co., and in case such proceeds are insufficient to pay this garnishee defendant the amounts due it as aforesaid, then this garnishee defendant will demand and enforce payment of the difference or deficit from said Frank Waterhouse & Co. under its said guaranty.

IX.

That Two Hundred Fifty Dollars (\$250.00) is a reasonable sum to be allowed this garnishee defendant as attorney's fees herein.

WHEREFORE, having answered, this garnishee defendant prays that it be discharged upon its answer and recover judgment for its costs and disbursements herein. And that it have such other and further relief as to this Court may seem meet.

ALMON RAY SMITH,

Attorney for Garnishee Defendant. [11]

State of Washington,
County of King,—ss.

H. G. Hotchkiss, being first duly sworn, on oath deposes and says that he is the cashier of the National City Bank of Seattle, a national banking association, and one of the garnishee defendants in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and the same is true, as he verily believes.

H. G. HOTCHKISS,

Subscribed and sworn to before me this 10th day of August, A. D. 1920.

RAY SMITH,

Notary Public. [12]

COPY.

LETTER OF CREDIT No. 1128
THE NATIONAL CITY BANK
of Seattle.

Seattle, Washington, May 17th, 1920.

\$65,100.00)

128,100.00) U. S. Currency.

210,000.00)

Kelly & Co., Ltd.,
Hong Kong, China.

Dear Sir:

We hereby authorize you to draw on The National City Bank, Seattle, Washington, at 30 days Sight for account of Frank Waterhouse & Co. of Seattle, Wn. for any sum or sums not exceeding in all

Sixty-five Thousand One Hundred
One Hundred Twenty-eight Thousand One Hundred
(1) Two Hundred Ten Thousand. . . . DOLLARS
for cost of merchandise to be shipped to Seattle,
Wash. covering 155; 305; 500 tons *standard white*
granulated sugar packed in double bags, quality
net shipping weight guaranteed by Lloyds and with
Hong Kong government certificates of inspection
and analysis.

The Drafts negotiated under this Credit must
be endorsed hereon and bear the clause: "Drawn
under Credit No. 1128 of the National City Bank,
Seattle, Washington, dated May 17th, 1920" and
advice thereof, in original and duplicate sent to
the National City Bank, Seattle, Washington, ac-
companied with Invoice, Consular Certificate and
set

entire set of negotiable bills of lading made out to
order of the shipper blank endorsed.

We hereby engage that drafts in compliance with
the terms of this Credit will be duly honored if
drawn on or before June 1st, 1920.

Insurance provided by shipper.

Your obedient servants,
THE NATIONAL CITY BANK.

H. G. HOTCHKISS,
Cashier.

Entered Folio —

H. WITHERSPOON,
Vice-President.

GUARANTY.

Seattle.

To the National City Bank,
Seattle.

Having received your Letter of Credit No. —

I

a copy of which is on the other side hereof, we do hereby agree to its terms, and in consideration myself

thereof, do bind ourselves to pay to you a sufficient sum in Dollars, United States Currency, in this City, to cover any drafts drawn and negotiated in virtue of said Credit together with Commission at — of one per cent.

I

We hereby give you specific claim and lien on all goods and merchandise and proceeds thereof, for which the negotiators of drafts drawn in virtue of and

said Credit or the [13] National City Bank or its correspondents may have paid or for which they may have come under any engagements in virtue of said Credit, all Policies of Insurance on such goods and merchandise to an amount sufficient to cover all advances and engagements under said Credit, and all Bills of Lading given therefor, with full power and authority to take possession and dispose of the same at your discretion, at private or public sale, with or without demand of performance

ance or notice of sale to us or to the public, for your security or reimbursement, including commission

for sale and guaranty and all expenses; unless on
my I

our application we provide payment in some other
way satisfactory to you.

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We pledge to you as security for all and any in-
debtedness or liability existing or that may here-

me

after arise from us to you under said Letter of

I

Credit, all of said securities, and we further stipu-
late that all securities which shall be received here-
under may be held, and applied by you to secure
any and all indebtedness or liability existing or

me

which may hereafter arise from us to you under
said Letter of Credit.

Marine Insurance on said goods and merchandise
shall be effected in — with such company or com-
panies and for such amount as you may direct; all
policies shall be assigned to you, and loss, if any
shall be made payable to you in Currency of the
United States of America.

In the event of the goods or merchandise being
shipped by or on board of a vessel carrying the flag

I

of a nation at war, we hereby agree to insure
against war risk, and failing to do so, you are au-

my

thorized to effect such insurance at our expense.

FRANK WATERHOUSE & Co.

By R. D. Smalley,

Treas. [14]

COPY.

No. 78443. * Due 7-15-20.

Seattle, Wash., July 3, 1920.

\$500.00.

July 15, 1920 after date, for value received, I promise to pay to the order of The National City Bank of Seattle, at the Banking-House of said Bank, the sum of Five Hundred and no /100 Dollars, with interest at the rate of 8 per cent, per annum from maturity until paid, principal and interest payable in U. S. Gold Coin. For value received, each and every party signing or endorsing this note hereby waves presentment, demand, protest and notice of non-payment thereof, binds himself thereon as a principal, not as a surety, and promises in case suit is instituted to collect the same or any portion thereof, to pay such additional sum as the Court may adjudge reasonable as attorney's fees in such suit, and agrees to remain bound, notwithstanding any extension or extensions that may be made to any party liable on this note, and consent is hereby given to any such extension or extensions, and agrees, in case suit be brought to collect this note, or any part thereof, that at the option of the holder thereof, the venue of said suit may be laid in King County, Washington. As collateral security for the payment of this note and all other indebtedness now or hereafter owing from me to said Bank, I hereby pledge and deliver to payee the following security:

Order on Frank Waterhouse & Co. Amount due about \$6000.00.

In case of default in the payment of this note or interest thereon, I authorize the holder of this obligation to sell, without notice to me, and at his option at public or private sale, the whole or any part of said security, and to apply the proceeds to the payment of this note and interest thereon, he accounting to me for the surplus, if any. In case of a deficiency, I promise to pay to the holder the amount thereof forthwith after the sale. At the option of the holder, one or more sales may be had thereunder. I hereby waive notice and advertisement of sale. The holder may purchase at any such sale. Nothing herein contained shall preclude a suit upon this note without resort to said collateral.

P. O. Address 212 Mehlhorn Bldg.

INTERNATIONAL TRADING CO. OF
AMERICA, INC.

G. W. Nelson,
Secy. and Treas.

Telephone No. E11. 1158.

Seattle, Washington, June 5, 1920.

For value received, I hereby assign, transfer and set over to the National City Bank of Seattle all my right, title and interest in and to the amount due us from Frank Waterhouse & Co., in connection with shipments of 500 tons of sugar from Kelley & Company, Limited, Hong Kong, China,

to Montgomery, Ward & Company of Chicago, Illinois, and authorize said Frank Waterhouse & Co. to pay to said National City Bank of Seattle the amount due under their Letter of May 13, 1920.

INTERNATIONAL TRADING CO. OF
AMERICA.

By G. W. Nelson,
Secy. and Treas.

Approved:

FRANK WATERHOUSE & COMPANY.

By R. D. Smalley,
Treasurer. [15]

Service of within answer and receipt of copy admitted this 10th day of August, 1920.

McCLURE & McCLURE,
Attorneys for Plaintiff.

[Endorsements]: Filed Aug. 10, 1920. [16]

[Caption and Title.]

Assignment of Judgment.

For value received, The Hale Company, a corporation, does hereby assign and transfer to Martin Rozema, that certain judgment rendered in the above-entitled action in favor of the plaintiff and against the defendant for the sum of Fifty-two Hundred (\$5200.00) Dollars, interest and costs, rendered on the 7th day of July, 1920.

IN WITNESS WHEREOF, The Hale Company, a corporation, has caused these presents to be executed by its Secretary thereunto duly authorized

and its corporate seal to be hereunto affixed this
31st day of May, 1921.

[Corporate Seal] THE HALE COMPANY.

By P. B. Nelson,
Secretary.

Subscribed and sworn to before me this 1st day
of June, 1921.

[Notary Seal] MARGUERITE S. BRUNER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsements]: Filed Nov. 16, 1921. [17]

[Caption and Title.]

Notice of Substitution of Attorneys for Plaintiff.

To the above-named defendants and to all persons
interested in the above-entitled action:

NOTICE IS HEREBY GIVEN that the under-
signed attorneys of record for the plaintiff have
withdrawn from said action as attorneys for the
plaintiff, and that the law firm of Hadley & Hadley
may be and they are hereby substituted as attor-
neys for the plaintiff in the above-entitled action.

Dated this 8th day of June, 1921.

McCLURE & McCLURE,
Attorneys for Plaintiff.

[Endorsements]: Filed Nov. 16, 1921. [20]

[Caption and Title.]

**Amended Affidavit Controverting Answer of the
National City Bank, a Corporation, Garnishee
Defendant.**

State of Washington,
County of King,—ss.

Edgar S. Hadley, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for Martin Rozema, the assignee of the judgment in the above-entitled action from The Hale Company, a corporation, which said assignment of judgment is now of record in this action, and the said Martin Rozema has succeeded to all the interests of the plaintiff corporation; that he makes this affidavit in behalf of said Martin Rozema for the purpose of controverting the answer of the National City Bank as garnishee defendant herein;

That said substituted plaintiff denies the allegations contained in the answer of said garnishee defendant wherein it denies that it, at the time of the service of said writ or at any time since, has been or is now indebted to the above-named defendant in any amount whatsoever or that it had in its possession at the time of the service of said writ, or at any time thereafter, prior to the date of answer, any effects of defendant in its possession or under its control; [21]

That said substituted plaintiff and this affiant have no knowledge as to the allegations contained

in paragraphs II, III, IV, V, VI, VII and VIII thereof, and therefore deny the same, except that affiant admits that said sugar arrived at Seattle, Washington, or or about July 16th, 1920, and admits the sale thereof to Montgomery Ward & Co. and John Sexton & Co. of Chicago, Illinois, and admits that bills of lading therefor were issued; and expressly denies that said bills of lading were endorsed, transferred and delivered to said garnishee defendant as in said answer stated; and in respect thereto alleges that if said bills of lading were endorsed and delivered, the same occurred after the service of said writ of garnishment upon said National City Bank, and further alleges that said garnishee defendant, National City Bank, had in its possession and under its control at the time of the service of said writ of garnishment upon it sums of money belonging to the said International Trading Company of America, a corporation, and was at said time indebted to the said International Trading Company of America, the amount of such indebtedness being in excess of the sums due upon the judgment of said The Hale Company, now the judgment of Martin Rozema; that said garnishee defendant has, since the service of said writ of garnishment and prior to the time of filing its answer, received for, and paid out, on behalf of said International Trading Company of America a large sum of money, to wit: the sum of about \$35,000.00;

That this affiant has good reason to believe and does believe that the answer of said garnishee de-

fendant is incorrect in the particulars above stated.
EDGAR S. HADLEY.

Subscribed and sworn to before me this 9th day
of June, A. D. 1921.

[Notary Seal] CLYDE M. HADLEY,
Notary Public in and for the State of Washington,
Residing at Seattle. [22]

Service of the within notice is accepted and re-
ceipt of copy admitted this 11th day of June, 1921.

ALMON RAY SMITH,
Attorney for Gar. Defendant.

[Endorsements]: Filed Jun. 11, 1921. [23]

[Caption and Title.]

Waiver of Jury.

The parties hereto hereby stipulate that this cause
be tried before the Court and without a jury.

Dated this 11th day of December, 1922.

HADLEY, HAY & HADLEY & BAUSMAN, OLD-
HAM BULLITT & EGGERMAN,
Attorneys for Plaintiff.

ALMON RAY SMITH & POE & FALKNOR,
Attorneys for Garnishee Defendant.

[Endorsements]: Filed Dec. 12, 1922. [24]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 5003.

THE HALE COMPANY, a Corporation (MAR-
TIN ROZEMA, Assignee of the Judgment),
Plaintiff,

vs.

INTERNATIONAL TRADING COMPANY OF
AMERICA, a Corporation,
Defendant.

THE NATIONAL CITY BANK OF SEATTLE,
a National Banking Association,
Garnishee Defendant.

Findings of Fact and Conclusions of Law.

This cause having been heretofore and at the November term 1922 and on the 12th day of December, 1922, submitted to the Honorable Edward E. Cushman, Judge of the above-entitled Court, for decision, a jury having been waived by all parties by stipulation in open Court, thereafter reduced to writing and filed herein, upon the affidavit and writ of garnishment, the answer of the garnishee defendant and the affidavit of the plaintiff controverting the answer of the garnishee defendant, the plaintiff appearing by Messrs. Hadley, Hay & Hadley and Messrs. Bausman, Oldham, Bullitt & Eggerman, his attorneys, the garnishee defendant appearing by Messrs. Poe & Falknor and Almon Ray Smith, its

Attorneys, and William T. Laube, as trustee of the bankrupt estate of Frank Waterhouse & Company, intervenor, also appearing by Messrs. Grinstead & Laube, J. A. Laughlin of counsel, his attorneys, and the Court after hearing the evidence and the arguments of counsel for the respective parties, and being fully advised in the premises, here and now makes the following findings of fact and conclusions of law: [25]

FINDINGS OF FACT.

I.

That at the time of the service of said writ of garnishment on the National City Bank of Seattle, garnishee defendant, said garnishee defendant was not indebted to the defendant International Trading Company of America in any amount whatsoever and was not indebted to said defendant International Trading Company of America at any time subsequent to the service of said writ prior to the service of the answer of the garnishee defendant.

II.

That at the time of the service of said writ of garnishment, The National City Bank of Seattle, garnishee defendant, had no effects or personal property of the defendant International Trading Company of America in its possession or under its control and at no time subsequent to the service of said writ and prior to the service of the answer had any effects or personal property of said defendant in its possession or under its control.

III.

That Two Hundred Fifty Dollars (\$250.00) is a

reasonable sum to be allowed the garnishee defendant as attorneys' fees herein.

Done in open Court this 21st day of December, 1922.

EDWARD E. CUSHMAN,
Judge.

From the foregoing findings of fact, the Court here and now makes the following conclusions of law:

I.

That the National City Bank of Seattle, garnishee defendant, is entitled to be discharged and dismissed.

II.

That said garnishee defendant is entitled to a judgment [26] against Martin Rozema, the assignee of plaintiff, for its costs and disbursements herein, including attorneys' fees in the sum of Two Hundred Fifty Dollars (\$250.00).

Done in open Court this 21st day of December, 1922.

EDWARD E. CUSHMAN,
Judge.

[Endorsements]: Filed Dec. 21, 1922. [27]

[Caption and Title.]

Judgment.

This cause having been heretofore and at the November term 1922 and on the 12th day of December, 1922, submitted to the Honorable Edward E.

Cushman, Judge of the above-entitled court, for decision, a jury having been waived by all parties by stipulation in open Court, thereafter reduced to writing and filed herein, upon the affidavit and writ of garnishment, the answer of the garnishee defendant and the affidavit of the plaintiff controverting the answer of the garnishee defendant, the plaintiff appearing by Messrs. Hadley, Hay & Hadley and Messrs. Bausman, Oldham, Bullitt & Eggerman, his attorneys, the garnishee defendant appearing by Messrs. Poe & Falknor and Almon Ray Smith, its attorneys, and William T. Laube, as trustee of the bankrupt estate of Frank Waterhouse & Company, intervenor, also appearing by Messrs. Grinstead & Laube, J. A. Laughlin of counsel, his attorneys, and the Court after hearing the evidence and the arguments of counsel for the respective parties, and being fully advised in the premises and having made its findings of fact and conclusions of law herein, [28]

IT IS CONSIDERED, ORDERED, ADJUDGED and DECREED that The National City Bank of Seattle be and it is hereby discharged and dismissed, and

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED and DECREED that The National City Bank of Seattle have and recover of and from Martin Rozema a judgment for its costs and disbursements herein to be taxed and attorneys' fees in the sum of Two Hundred Fifty Dollars (\$250.00).

Done in open court this 21st day of December,
1922.

EDWARD E. CUSHMAN,
Judge.

Plaintiff excepts and exception allowed.

EDWARD E. CUSHMAN,
Judge.

[Endorsements]: Filed Dec. 21, 1922. [29]

[Caption and Title.]

Proposed Bill of Exceptions.

This was a garnishment proceeding against the National City Bank of Seattle, garnishee defendant, by Hale Company, a corporation, plaintiff, upon a judgment obtained in said court against the International Trading Company of America, a corporation, principal defendant, which said judgment was assigned to Martin Rozema, the present plaintiff.

The issue in this proceeding came on duly and regularly for hearing before the Hon. Edward E. Cushman, one of the Judges of the above-entitled court, without the intervention of a jury, the parties aforesaid by their counsel, having waived a jury according to the statute in such case made and provided; the plaintiff appearing by Messrs. Hadley, Hay & Hadley, and Bausman, Oldham, Bullitt & Eggerman, his counsel, and the garnishee defendant appearing by Messrs. Poe & Falknor, and

(Testimony of George W. Nelson.)

Allan Ray Smith, its counsel, whereupon the following testimony was produced and proceedings had, to wit:

Testimony of George W. Nelson, for Plaintiff.

GEORGE W. NELSON, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

My occupation is that of importing and exporting. During [37] the year 1920, I was Secretary, Treasurer and General Manager of the International Trading Company of America, a corporation, and am still with such company. We sold Montgomery, Ward & Company 500 tons of sugar which we were to get from Kelley & Company of Hong Kong, China. In order to have that sugar shipped here, it was necessary for us to open a letter of credit in Hong Kong to cover the payment of the sugar. We went to the National City Bank to have it done, but they refused to open it for us. Mr. Witherspoon, the vice-president, stated that due to the speculative market in sugar at that time, they could not open it for us, as we did not have credit standing enough to cover a quarter of a million dollars worth of sugar, but suggested that I see Frank Waterhouse & Co., stating at that time that perhaps it would cost me some of my profits, but he thought they could handle the transaction for me. I went up and saw Mr. Boxer, manager of the foreign department of Frank Waterhouse & Co., taking with me the or-

(Testimony of George W. Nelson.)

iginal letter of credit from Chicago issued for the account of Montgomery, Ward & Co. Mr. Boxer called in Mr. Smalley, the treasurer of Frank Waterhouse & Co., and they wrote up a contract between Frank Waterhouse & Co. and the International Trading Company of America covering the Montgomery, Ward & Co. sugar transaction. (Contract referred to here offered in evidence and received and marked Plaintiff's Exhibit No. 1.)

Plaintiff's Exhibit No. 1.

FRANK WATERHOUSE & COMPANY

DOMESTIC TRADE DEPARTMENT
E. J. BOXER, Manager

NEW YORK
CHICAGO
SAN FRANCISCO
CLEVELAND
TACOMA
VANCOUVER, B. C.
KOBE, JAPAN

Seattle, U. S. A.

May 13th, 1920.

International Trading Company of America, Inc.,
Seattle, Washington.

Gentlemen:

Acting upon your request of the 13th inst., we agree to assist you in transferring funds covering sales made by you to Montgomery Ward & Company, Chicago of 500 tons of sugar from Hong Kong, this sugar having been purchased by you from Kelley & Company, Limited, Hong Kong.

In assisting you to transfer funds enabling you to complete the deal as between the seller and buyer, it is distinctly understood that all purchases and sales of the above mentioned sugar were handled

(Testimony of George W. Nelson.)

solely by you and your associates, and that our only interest in this matter is in the transfer of finances.

In consideration of our assisting you in transfer of finances you agree to allow us a fee of one third ($1/3$) of the net profit on this deal; all letters of credit are to be assigned to us thru our banking connections, finances will be handled and on the consummation of this deal, when sugar arrives and is shipped from Seattle and all drafts are paid, we will then render an accounting to you, deducting from the gross profits any expenses incurred, viz., telegraph and cable charges, interest charges, etc., and of the remaining balance we will remit to you two thirds ($2/3$).

Yours very truly,

FRANK WATERHOUSE & COMPANY.

EJB:J

By E. J. Boxer.

E. J. BOXER,

Mgr., Domestic Trade Dept.

Accepted:

INTERNATIONAL TRADING COMPANY OF
AMERICA, INC.

By G. W. Nelson,

Secretary & Treasurer.

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monekton, Clerk.

After entering into this agreement, Mr. Boxer and I went to the National City Bank and saw Mr. Hotchkiss. We had written out the form, or the wording, of the letter of credit we wanted

(Testimony of George W. Nelson.)

opened in Hong Kong, on a little slip of paper, and Mr. Boxer instructed Mr. Hotchkiss to open a letter of credit in Hong Kong as per the writing on this slip of paper which [38] Mr. Boxer presented, covering this 500 tons of sugar. Mr. Hotchkiss agreed that he would open the credit immediately for this sugar. We had no other orders for sugar at that time and there was nothing said about any other orders for sugar.

I was in the bank nearly every day on some matter or other, and within two or three days after the contract with Frank Waterhouse & Co. had been entered into (Plaintiff's Ex. 1) I showed it to Mr. Witherspoon, because he had been kind enough to send me to Frank Waterhouse & Co. where I had been able to get the accommodation.

The letter of credit you hand me is the one issued by the First National Bank of Chicago for the account of Montgomery, Ward & Co., covering the 500 tons of sugar we sold them. (Letter of credit referred to received in evidence and marked Plaintiff's Exhibit No. 2.) I transferred it to Frank Waterhouse & Co.

Plaintiff's Exhibit No. 2.

No. G. C. A6250. \$234,000*

Capital and Surplus \$22,000,000.00
\$234,000.00 (U. S. Currency.)

THE FIRST NATIONAL BANK OF CHICAGO.

Chicago, May 15, 1920.

Messrs. International Trading Company of America,
Inc., Seattle, Washington.

Gentlemen:

We hereby authorize you to value on the First National Bank of Chicago, at sight for any sum or sums not exceeding in all Two Hundred & Thirty-four Thousand Dollars (U. S. Currency) for account of Messrs. Montgomery Ward & Company, Chicago, Illinois, for cost of 500 tons Standard White Sugar to be shipped to Chicago, Illinois, @ \$23.40 F. O. B. cars Seattle.

The Bills of Lading must be issued to the order of Shippers' and endorsed in blank.

The Shipment must be completed and the Bill drawn on or before August 1, 1920, and the advice thereof ~~(in duplicate)~~ sent to The First National Bank of Chicago, accompanied by Bill of Lading and abstract of Invoice, on receipt of which Documents the Bills will be duly honored.

~~The remaining Bills of Lading with certified Invoices and Consular Certificates must be sent by the Bank or Banker negotiating drafts to — for account of the First National Bank of Chicago and a certificate to that effect must accompany draft.~~

(Testimony of George W. Nelson.)

We hereby agree with drawers endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the counter of The First National Bank of Chicago.

This credit is confirmed and irrevocable.

Insurance

Drafts under this Credit must bear upon their face the words:

Drawn under The First National Bank of Chicago. Credit No. G. C. A6250. Dated May 15, 1920.

If desired, draft drawn under this credit will be paid at the counter of the National City Bank of Seattle, Seattle, Washington.

Respectfully Yours,

[Signature Illegible.]

Countersigned W. G. STRAND, Mgr.

[Printed across face:] Original Copy.

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

Later, in June, I had some further dealings with the bank in regard to the Montgomery, Ward & Co. order. I went to Mr. Witherspoon and requested a loan of \$500 for the company. He asked me about this sugar transaction again, and what collateral I would be willing to give, and when I told him again about the contract with Waterhouse & Co., he suggested that I give him an order on Waterhouse & Co., an assignment of our two-

(Testimony of George W. Nelson.)

thirds of the profit in the Montgomery, Ward & Co. transaction as collateral security for this loan. I told him I would give them an order, and if I remember right, Mr. Witherspoon dictated the way he wanted the order written, and asked me to take it up and have Waterhouse & Co. approve it, which I did, and Mr. Smalley approved it, and I turned it over to the National City Bank, together with a copy of my contract with Waterhouse & Co. on the Montgomery, Ward & Co. transaction, signed [39] the note, and he extended the loan. The assignment and note are pleaded in the answer. (Assignment and note referred to here identified by witness and received in evidence, marked respectively Plaintiff's Exhibit No. 3 and Plaintiff's Exhibit No. 4.)

Plaintiff's Exhibit No. 3.

Seattle, Washington, June 5, 1920.

For value received, I hereby assign, transfer and set over to The National City Bank of Seattle all my right, title and interest in and to the amount due us from Frank Waterhouse & Co., in connection with shipments of 500 tons of sugar from Kelley & Company, Limited, Hongkong, China, to Montgomery, Ward & Company of Chicago, Illinois, and authorize said Frank Waterhouse & Co., to pay said National City Bank of Seattle the amount due under their letter of May 13, 1920.

INTERNATIONAL TRADING CO. OF
AMERICA.

By G. W. Nelson,
Sec'y & Treasurer.

Approved:

FRANK WATERHOUSE & COMPANY.

By R. D. SMALLEY,

Treasurer.

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 4.

No. 77417 Due —

\$500.00

Seattle, Wash., June 4, 1920.

July 3-20 after date, for value received, I promise to pay to the order of The National City Bank of Seattle, at the Banking-house of said Bank, the sum of Five Hundred and No/100 Dollars, with interest at the rate of 8 per cent. per annum from mat until paid, principal and interest payable in U. S. Gold Coin. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest and notice of non-payment thereof, binds himself thereon as a principal, not as a surety, and promises in case suit is instituted to collect the same or any portion thereof, to pay such additional sum as the Court may adjudge reasonable as attorney's fees in such suit, and agrees to remain bound, notwithstanding any extension or extensions that may be made to any party liable on this note, and consent is hereby given to any such extension or extensions, and agrees, in case suit be brought to collect this note, or any part thereof, that at the option of the holder hereof, the venue of said suit may be laid in King County, Washington. As collateral security for the payment of this note and

all other indebtedness now or hereafter owing from me to said Bank, I hereby pledge and deliver to payee the following security:

Order on Frank Waterhouse & Co., amount due about \$6,000.

In case of default in the payment of this note or interest thereon, I authorize the holder of this obligation to sell, without notice to me, and at his option at public or private sale, the whole or any part of said security, and to apply the proceeds to the payment of this note and interest thereon, he accounting to me for the surplus, if any. In case of a deficiency, I promise to pay to the holder the amount thereof forthwith after the sale. At the option of the holder, one or more sales may be had thereunder. I hereby waive notice and advertisement of sale. The holder may purchase at any such sale. Nothing herein contained shall preclude a suit upon this note without resort to said collateral.

P. O. Address _____

Telephone No. _____

INTERNATIONAL TRADING CO. OF AMERICA, INC.

G. W. Nelson,
Sec'y & Treas.

[Stamped across face:] The National City Bank of Seattle. Renewed, Jul. 6, 1920. L. & D.

[On Reverse Side]:

G. W. NELSON.

[Stamp]

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

(Testimony of George W. Nelson.)

The reference in the assignment of the amount due under their letter of May 13th, 1920, refers to the contract between Waterhouse & Co. and the International Trading Co. which has been marked Plaintiff's Exhibit No. 1. A copy of that contract was given to the bank along with that assignment.

On May 19, 1920, we secured an order from John Sexton & Co. and on May 20th, we received a notice from the Seattle National Bank that they had been advised by telegraph that a credit had been issued in our favor that day.

On May 21st or 22d, I again went to Waterhouse & Co. and entered into another transaction or contract with them covering the purchase of 155 tons of sugar for John Sexton & Co. This contract was dated May 22d, and is in identical language with the other with the exception of the amount of sugar and the purchaser. (Contract referred to here received in evidence and marked Plaintiff's Exhibit No. 5.)

Plaintiff's Exhibit No. 5.**FRANK WATERHOUSE & COMPANY**

DOMESTIC TRADE DEPARTMENT
E. J. BOXER, Manager.

NEW YORK
CHICAGO
SAN FRANCISCO
CLEVELAND
TACOMA
VANCOUVER, B. C.
KOBE, JAPAN

Seattle, U. S. A.

May 22, 1920.

International Trading Company of America, Inc.,
Seattle, Washington.

Gentlemen:

Acting upon your request of the 13th inst., we agree to assist you in transferring funds covering sales made by you to John Sexton Company, Chicago, of 155 tons of sugar from Hong Kong, this sugar having been purchased by you from Kelley & Company, Limited, Hong Kong.

In assisting you to transfer funds enabling you to complete the deal as between the seller and buyer, it is distinctly understood that all purchases and sales of the above mentioned sugar were handled solely by you and your associates, and that our only interest in this matter is in the transfer of finances.

In consideration of our assisting you in transfer of finances you agree to allow us a fee of one third ($\frac{1}{3}$) of the net profit on this deal; all letters of credit are to be assigned to us thru our banking connections, finances will be handled and on the consummation of this deal, when sugar arrives and is shipped from Seattle and all drafts are paid, we will then render an accounting to you, deducting

(Testimony of George W. Nelson.)

from the gross profits any expenses incurred, viz., telegraph and cable charges, interest charges, etc., and of the remaining balance we will remit to you two thirds (2/3).

Yours very truly,

FRANK WATERHOUSE & COMPANY.

EJB:J

By E. J. Boxer.

E. J. BOXER,

Mgr., Domestic Trade Dept.

Accepted:

INTERNATIONAL TRADING COMPANY OF
AMERICA, INC.

By G. W. Nelson,
Secretary & Treasurer.

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

In the copy of the letter of credit attached to the answer of the garnishee defendant there are three bunches of sugar mentioned, one for 550 tons for Montgomery, Ward & Co., one for 155 tons for John Sexton & Co., and 305 tons for a purchaser in St. Paul.

Kelly & Co. of Hong Kong shipped short. They did not ship the 305 tons for the St. Paul purchaser, and only 85 tons of the 155 tons intended for John Sexton & Co. [40]

Cross-examination.

We were negotiating for the sale of sugar to half a dozen eastern buyers. One of them was Mont-

(Testimony of George W. Nelson.)

gomery, Ward & Co., another John Sexton & Co., and someone in St. Paul another. We were contemplating buying that sugar in Hong Kong and were unable to finance the transactions. We got letters of credit from three eastern buyers, one at a time, and we transferred them to Waterhouse & Co., one at a time, and entered in similar agreements with Waterhouse & Co. with reference to the division of the profits that might be made. Waterhouse & Co. went to the National City Bank and got this letter of credit. All the sugar was shipped in one shipment at one time to the order of Kelley & Co. which drew one draft for the entire shipment against the letters of credit. My understanding was that there was more than one letter of credit. I never saw one. I do not know that there was but one letter of credit, one guarantee by Waterhouse & Co. and I want the Court to understand that distinctly.

The contracts we entered into with Frank Waterhouse & Co. were all similar, word for word. We had three buyers of sugar in the east and we entered into similar contracts with respect to each of these buyers as they came in. We did not buy the sugar at one time for one shipment, but you are right that they were all shipped at once. All the contracts with Frank Waterhouse contained this provision "When sugar arrives and is shipped from Seattle and all drafts are paid." After all drafts were paid our profits were to come in. "When all drafts are paid" means paid by the

(Testimony of George W. Nelson.)

purchasers, and I presume the drafts of the seller also. As far as I know the National City Bank paid the Kelley & Co. draft. I do not know whether it has been reimbursed.

I was not present when the letter of credit was [41] *signed* signed by Frank Waterhouse & Co. at the National City Bank and do not know when it was signed or issued. I just learned the other day from a remark of Mr. Smalley that the National City Bank had established only one letter of credit on these purchases in Hong Kong.

Testimony of H. G. Hotchkiss, for Plaintiff.

H. G. HOTCHKISS, produced as a witness on the part of the plaintiff, and having been first duly sworn, testified as follows:

I am the Cashier of the National City Bank. I was served with a subpoena to produce certain records of the bank. The first cable I sent with reference to the sugar under consideration was on May 17, 1920, to the International Banking Corporation at Hong Kong, for the purchase of 500 tons of sugar for a total of \$210,000, signed by the bank's cable name.

(Cable referred to received in evidence and marked Plaintiff's Exhibit No. 6.)

Plaintiff's Exhibit No. '6.

5/17/1920.

statesbank	International Banking Corporation
hongkong	Hong Kong China
abvud	will accept
erkak	draft(s) at 30 days sight
etliz	drawn by
kelco	Kelly & Co. Ltd.
duloc	covering
uralb	500 tons
saurm	standard (s)
weper	white
gypef	granulated
sugar	sugar
nybyg	packed in
ercif	double
avawy	bag (s)
onnja	quality (of)
kuhav	nett
rogto	shipping
vyrge	weight (s)
hagak	guaranteed by
joelb	Lloyds
alavk	and
wisaz	with
hongkong	Hong Kong
gyiwa	government (s)
bynra	certificates of
ikijp	inspection

alavk	and
akzlo	analysis
grovs	full
razuz	set (s)
azkoz	bill (s) of lading
faocs	endorsed
idvud	in
aztsa	blank (s)
ipyto	invoice (s)
diege	consular
ipyto	invoice (s)
ascit	attached (to)
mosvo	210000
epusd	dollars
dowge	C. I. F.
Seattle	Seattle
ergeh	draft (s)
klujf	must be
etgar	drawn
alavk	and
rivec	shipment (s) from
hongkong	Hong Kong
ejobs	prior (to)
ivcep	June 1st.
mezor	1920
natcitbank	The National City Bank

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One or two days before this, about May 15th, Mr. Boxer and Mr. Nelson came in together in

(Testimony of H. G. Hotchkiss.)

reference to establishing a letter of credit for the purchase of the 500 tons of sugar from Kelley & Co. in the Orient, and as a result of that conversation I sent such cable. On this May 15th, the only thing under consideration was the purchase of 500 tons of sugar which they told me had been sold to Montgomery, Ward & Co. of Chicago.

Plaintiff's Exhibit No. 2, which is the Montgomery, Ward and Company letter of credit in favor of the International Trading Co. was probably delivered to the bank about May 18th and remained there in its custody.

On May 17th, 1920, the bank had drawn a letter of credit, (Letter referred to received in evidence and marked Plaintiff's Exhibit No. 7.)

Plaintiff's Exhibit No. 7.

THE NATIONAL CITY BANK OF SEATTLE.

Capital \$500,000.00. Surplus \$100,000.00.

LETTER OF CREDIT

No. 1128

**THE NATIONAL CITY BANK
OF SEATTLE**

Seattle, Washington, May 17, 1920.

M Kelly & Co., Ltd.

Hong Kong, China.

\$ 65,100.00)

128,100.00) U. S. Currency

210,000.00)

Dear Sir:

We hereby authorize you to draw on
THE NATIONAL CITY BANK, SEATTLE,

WASHINGTON, at 30 days Sight for account of
Frank Waterhouse & Co. of Seattle, Wn. for any
sum or sums not exceeding in all

Sixty-five Thousand One Hundred....

One Hundred Twenty-eight Thousand

One Hundred..... DOLLARS

Two Hundred Ten Thousand.....

for cost of merchandise to be shipped to Seattle,

155

305

Wash. Covering 500 tons standard white granu-
lated sugar packed in double bags, quality nett
shipping weight guaranteed by Lloyds and with
Hong Kong government certificates of inspection
and analysis.

The Drafts negotiated under this Credit must be
endorsed hereon and bear the clause: "Drawn
under Credit No. 1128 of THE NATIONAL CITY
BANK, SEATTLE, WASHINGTON, dated May
17th, 1920" and advice thereof, in original and dupli-
cate sent to THE NATIONAL CITY BANK, SE-
ATTLE, WASHINGTON, accompanied with In-
voice, Consular Certificate and entire set of nego-
tiable Bills of Lading made out to order of the
shipper blank endorsed.

We hereby engage that drafts in compliance with
the terms of this Credit will be duly honored if
drawn on or before June 1st, 1920.

Insurance provided by shipper.

Your obedient servants,

THE NATIONAL CITY BANK.

Entered, Folio —.

H. Witherspoon, Vice President.

H. G. Hotchkiss,

Cashier.

[Printed across face]: Copy.

GUARANTY

Seattle,

To the National City Bank,

Seattle.

Having received your Letter of Credit No. a

I

copy of which is on the other side hereof, we do hereby agree to its terms, and in consideration myself

thereof, do bind ourselves to pay to you a sufficient sum in Dollars, United States Currency, in this City, to cover any drafts drawn and negotiated in virtue of said Credit, together with commission at of one per cent.

I

We hereby give you specific claim and lien on all goods and merchandise and proceeds thereof, for which the negotiators of drafts drawn in virtue of and and said Credit or the National City Bank, or its correspondents may have paid or for which they may have come under any engagements in virtue of said Credit, all Policies of Insurance on such goods and merchandise to an amount sufficient to cover all

advances and engagements under said Credit, and all Bills of Lading given therefor, with full power and authority to take possession and dispose of the same at your discretion, at private or public sale, with or without demand of performance or notice of

me

sale to us or to the public, for your security or reimbursement, including commission for sale and

my

guaranty and all expenses; unless on our applica-

I

tion we provide payment in some other way satisfactory to you.

I

We pledge to you as security for all and any indebtedness or liability existing or that may here-

me

after arise from us to you under said Letter of

I

Credit, all of said securities, and we further stipulate that all securities which shall be received hereunder may be held, and applied by you to secure any and all indebtedness or liability existing or

me

which may hereafter arise from us to you under said Letter of Credit.

Marine Insurance on said goods and merchandise shall be effected in with such company or companies and for such amount as you may direct; all policies shall be assigned to you, and loss, if any shall be made payable to you in Currency of the United States of America.

(Testimony of H. G. Hotchkiss.)

In the event of the goods or merchandise being shipped by or on board of a vessel carrying the flag

I

of a nation at war, we hereby agree to insure against war risk, and failing to do so, you are au-

my

thorized to effect such insurance at our expense.

FRANK WATERHOUSE & CO.

By R. D. Smalley,

Treas.

[Printed in margin]:

GUARANTY

FOR

Letter of Credit No.....

dated.....

IN FAVOR OF

.....
.....

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

but on that date it was not the same as it [42] now appears. After that date two amounts were added to it: \$128,000 covering 305 tons of sugar, and \$65,000 covering 155 tons of sugar.

The letter of credit established by the National City Bank on May 17, 1920, was for \$210,000 covering 500 tons of Standard White Granulated sugar, with certain qualifications and requirements. That letter was established in accordance with the

(Testimony of H. G. Hotchkiss.)

cablegram—Plaintiff's Exhibit No. 6—and was to cover the purchase of sugar made by the International Trading Company to fulfill its contract with Montgomery, Ward & Co. The credit was issued for the account of Frank Waterhouse & Co. to fulfill the Montgomery, Ward & Co. transaction, the purchase by Montgomery, Ward & Co. from the International Trading Co. of 500 tons of White Granulated sugar. The next step in the transaction was the receipt by the bank, on or about May 18th, of the letter of credit of Montgomery, Ward & Co.

On May 20th, we increased this letter of credit of the 17th to the second amount there, \$128,000, which covers the purchase of the 305 tons. Our cable of that date was simply to increase the original credit as the transaction shows here.

(Cable referred to received and marked Plaintiff's Exhibit No. 8.)

Plaintiff's Exhibit No. 8.

5/20/1920.

Urgent

Statesbank

Hongkong

uglep

jifty

kelco

igdav

upwit

upanj

International Banking
Corporation

Hong Kong, China.

referring to our telegram
17th

letter credit

Kelly & Co.

increase it

300 tons

5 tons

(Testimony of H. G. Hotchkiss.) .

mopan	125,000
mifze	3,100
epusd	dollars
addub	on account of
intraco	International Trading Co.
	of America
nateitbank	National City Bank of
	Seattle

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

We sent this cable at the request of Frank Waterhouse & Co. That sugar was sold to a St. Paul house. As a matter of fact, that transaction failed entirely, so that there was no liability one way or the other on that St. Paul transaction.

The next step was on May 22d, when we were advised that Sexton & Co. had established a credit for the purchase of 155 tons of Standard White Granulated sugar, and upon receiving that advice we increased our credit in the Orient with \$65,100 covering the 155 tons, as is evidenced by this cable of May [43] 22d. (Cable referred to received in evidence and marked Plaintiff's Exhibit No. 9.)

(Testimony of H. G. Hotchkiss.)

Plaintiff's Exhibit No. 9.

May 22, 1920.

Urgent

Statesbank

International Banking
Corporation

Hongkong

Hong Kong, China.

uglep

referring to our telegram

17th

kelco

Kelley & Co. Ltd.

jifty

letter of credit

irfel

is

irems

irrevocable (ly)

igdav

increase it

uptap

150 tons

upanj

5 tons

mojum

65000

lidif

100

epusd

dollars

nateitbank

National City Bank of
Seattle

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

On May 22d, I altered the letter of credit of May 17th by including in it the \$65,100 covering the 155 tons of sugar.

After the instrument was complete (Plaintiff's Ex. No. 7) with all the amounts in, I had Mr. Smalley, Treasurer of Frank Waterhouse & Co. sign the guarantee on the back here. It was put

(Testimony of H. G. Hotchkiss.)

on after May 22d, 1920, I can't tell the exact date. I don't know whether it was a month after. My recollection is that it was two or three days or a week. I can't tell the exact date. It was after May 22d, within a few days. It was an oversight in not having the guarantee added. We generally have the guarantee put on two or three days after we draw the letter. This letter was drawn on the 17th, but the guarantee was not put on there on the 19th. We were holding the letter because we knew there were to be some additions to it. I had the information from Mr. Boxer. We didn't have anything firmly in hand, we had no letter established, no advice that any other letters had been established on May 17th. We would only issue our letter upon either the receipt by us of letters established by the purchasers, or telegraphic advice, or some communication that such a letter had been issued and was on the way.

On May 23d, we received the letter established by Sexton & Co., and that remained in our hands at all times.

(Letter of credit referred to received in evidence and marked Plaintiff's Exhibit No. 10.)

Plaintiff's Exhibit No. 10.

834

Commercial Credit
For Domestic Use

THE CORN EXCHANGE NATIONAL BANK
OF CHICAGO.

CAPITAL AND SURPLUS \$10,000,000.

No. 1627.

\$72,850.00 U. S.

Chicago, May 20th, 1920.

To International Trading Company of America, Inc.,
Gentlemen, Seattle, Washington.

We hereby authorize you to draw on The Seattle National Bank, in Seattle at sight for any sum or sums not exceeding in all Seventy Two Thousand Eight Hundred Fifty Dollars U. S. Gold for account of John Sexton & Company, Chicago for invoice cost of One Hundred Fifty Five tons standard white granulated sugar at \$23.50 net per 100 pounds packed in double sacks F. O. B. cars Seattle, Washington to be shipped to John Sexton & Company, Chicago. Immediate shipment from Hong Kong, China.

Railroad Bills of Lading issued to the order of the shipper and Certificates by Hong Kong Government and Lloyd's endorsed in blank together with invoices must accompany drafts covering quality, net shipping weights, inspection and analysis.

The Shipment must be completed and the drafts drawn by August 20th 1920.

We hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the office of The Seattle National Bank, Seattle, Washington.

Drafts under this Credit must bear upon their face the words: "Drawn under Corn Exchange National Bank of Chicago, Credit No. 1627 dated May 20th, 1920." This Credit is irrevocable up to and including August 20th, 1920.

We are, Gentlemen,

Yours faithfully,

OWEN I. REEVES V. P.

JOHN S. COOT, Asst. Cash.

148590. Plaintiff's Exhibit "B." Filed Sep. 27, 1921. George A. Grant, Clerk. By Benj. C. Levy, Deputy. Ent'd—5.

IN LOCK BOX NO. 9/9.

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

(Testimony of H. G. Hotchkiss.)

The next step in the transaction was on June 23, 1920, when we accepted the draft drawn by Kelley & Co. for \$244,000 payable thirty days after date. I accepted this draft personally on behalf of the bank. The paper you have showed me [44] is the draft.

(Draft referred to received in evidence and marked Plaintiff's Exhibit No. 11.).

Plaintiff's Exhibit No. 11.



Plaintiff's Exhibit # 11.

2244, 970, 46 U. S. Currency, Thirty

FILED

Value received which change to the account of

To National City Bank, Washington.

No.

14858

5003 418 81

12/12/22

George A. Gandy, Secretary

May 31st, 1921

of this First of Exchange (Second unpaid)

the sum of Two hundred forty

and forty six cents U.S. 00.

under irrevocable Credit established

through International Bank, May 17th.

KEENEY & Co., Ltd.

12/12/22

Plaintiff's Exhibit # 11.



(Testimony of H. G. Hotchkiss.)

The documents that our letter called for accompanied the draft and at that time I had seen them. Our letter of credit called for "Shipping weights guaranteed by Lloyds and Hong Kong Government certificates of inspection and analysis."

The documents you show me are the Hong Kong Government certificates with Lloyds guarantee attached, and these documents accompanied the draft.

(The documents referred to were received in evidence, the analysis being marked Plaintiff's Exhibit No. 12, and the certificates of weight were marked Plaintiff's Exhibit No. 13.)

Plaintiff's Exhibit No. 12.

Hongkong Agency No. 790.

We the undersigned Lloyd's Agents at the Port of Hongkong, Hereby Certify we have carefully examined the attached Reports, and believe that full confidence may be placed in same.

GILMAN & CO., LTD.

G. Miskin,

Director.

Lloyd's Agents.

Fee for Certificate \$5.00

Hongkong, 31st May, 1920.

[Stamp]:

Gilman & Co., Ltd.

Lloyd's Agents

Hong Kong.

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

Original 9 in
Lab. No. C681.

(M. 185.)

G. R.
Government Laboratory,
Hongkong, 29th May, 1920.

Seal.

Substance for analysis:—Granulated White Sugar (Java No. 24).

Marks:— 1352 Bags ex Yuen Fat Hong.

[In Diamond-shaped Character]

I. T. C.
K 9

Seattle (from a consignment of 5258 Bags).
Received:—From Messrs. Lammert Bros., on the
29th May, 1920.

RESULTS OF ANALYSIS.

Sugar (Direct Polarization) 98.5%

Signed. E. R. DOVEY,
Government Analyst.

[Stamp]: Gilman & Co., Ltd.

Lloyd's Agents,

Messrs. Kelley & Co.

Hongkong.

Hong Kong.

148590. Plaintiff's Exhibit "J." 23. Filed Sep. 27, 1921. George A. Grant, Clerk. By Benj. C. Levy, Deputy. Ent'd—5.

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 13.

Hongkong Agency No. 793

We the undersigned Lloyd's Agents at the Port of Hongkong, Hereby Certify that we have carefully examined the attached Weight Report, and believe that full confidence may be placed in same.

GILMAN & CO., LTD.

G. Miskin,

Director.

Fee for Certificate \$3.00

Lloyd's Agents.

Hongkong, 1st June, 1920.

[Stamp]:

Gilman & Co., Ltd.

Lloyd's Agents

Hong Kong.

B 02374

OFFICIAL MEASURER'S OFFICE.

Hongkong, 28th May, 1920

Weight of Cargo

Shipped per S. S. "Edmore"

To Seattle.

S/O. No. —

Shippers: Messrs. Kelley & Co.

Marks.	Numbers.	Number of Packages.	Contents.	Weight per Package. lbs.	Total Weight. lbs.
[In Diamond-shaped Character]					
I. T. C.					
K 1					

150 Bags White Sugar

The above shipment was weighed in full, and the total weight of the same is certified to be (thirty-three thousand five hundred and ninety-eight pounds).... .. 33,598

Fare of 150 Burlaps in which the original bags weighed were packed @ 2½ lbs. each 375

 33,973

(Testimony of H. G. Hotchkiss.)

The Total Tons of 20 cwt. of above 150 Packages are Fifteen tons, 3 cwt., 1 gr., 9 lbs.

W. E. WAKEHAM,

Sworn Measurer.

[Stamp]: Gilman & Co., Ltd.

Lloyd's Agents.

Hongkong.

148590. Plaintiff's Exhibit "L." 25. Filed Sep. 27, 1921. George A. Grant, Clerk. By Benj. C. Levy, Deputy. Ent'd—5.

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

There was also an invoice, consular certificates and a set of negotiable Ocean Bills of Lading, and a policy of insurance which accompanied the draft.

The draft was presented through the National Bank of Commerce. The draft with the documents attached came to me. I looked the documents over and accepted the draft, writing across the face "Payable thirty days after date." I do not recall that I did anything else prior to the acceptance of the draft. The draft was presented in person over the counter of the bank, during business hours, and I handed the messenger a trust receipt, and kept the documents on my desk until after 3 o'clock. I showed them to Mr. Witherspoon who assisted me in checking them up with the letter of credit. He and I read the documents. I have no recollection of communicating with anyone else before putting my written acceptance on the draft.

(Testimony of H. G. Hotchkiss.)

We returned the draft to the National Bank of Commerce and kept the documents. On its due date, we paid the draft. Between the time when we accepted the draft and the due date we did not communicate with the International Trading [45] Company relative to the payment of the draft, because they were not the ones we were looking to. I did communicate with some one of Waterhouse & Co. relative to its payment. I can't say just which persons. It is my impression that I talked with Mr. Smalley and with Mr. Boxer, both of them.'

We never forwarded to the Orient, or anywhere else, the letter of credit issued by us, and dated May 17, 1920. It is customary in issuing letters of credit for the issuing or drawing institution to give telegraphic or cable advice that it is issuing the letter of credit and then to forward the letter to the party in whose favor it is drawn or to some banking institution at the point where the credit is to be utilized. This is done where the mail will reach there in time, but in this case it would not. In this case the shipment had to leave on June 1st and it was impossible to get it through before that date. The cables that we sent was the only advice that we gave the Orient as to the terms and conditions and manner in which the letter was being opened, and we had no further communication with Kelley & Co., or the International *Banking* Corporation other than what we have produced here.

(Testimony of H. G. Hotchkiss.)

Cross-examination. *

Frank Waterhouse & Co. paid for these cables. At the time we sent the first cable, Mr. Boxer, who was the man of Frank Waterhouse & Co. whom I had dealings with said they expected several more letters of credit and that they would request us to cable as in the first instance. They expected those within the next few days. The letters that were issued by the other banks to the International were delivered to us.

The document you submit to me is a letter from the Dexter Horton National Bank to the International Trading Company, dated May 12, 1920, quoting a telegram received from the First National Bank of Chicago opening a letter of credit for [46] \$234,000. Below the International Trading Company of America have assigned to Frank Waterhouse & Co. This was the first credit opened on the Montgomery, Ward & Co. shipment.

(The letter and assignment above referred to were received in evidence and marked Defendant's Exhibit "A-1.")

Defendant's Exhibit No. "A-1."

**THE DEXTER HORTON NATIONAL BANK
OF SEATTLE.**

Capital \$1,200,000—Surplus \$240,000

N. H. Latimer, President.

W. H. Parsons, Vice President
C. E. Burnside, Vice President
R. H. MacMichael, Vice President
C. H. Dodd, Vice President
H. L. Merritt, Cashier
W. W. Scruby, Asst. Cashier
C. T. Glass, Asst. Cashier
C. W. Karner, Asst. Cashier
B. C. Yancey, Asst. Cashier
B. W. Pettit, Asst. Cashier

Seattle, Washington, May 12, 1920.

Foreign Department

International Trading Co., of America, Inc.,
Seattle.

Gentlemen:

We have received today the following telegram
from the First National Bank, Chicago,

"We have issued and are forwarding to you
today credit 6250 for \$234,000.00 favor Inter-
national Trading Company of America, Inc.,
for 500 tons standard white sugar at \$23.40
f. o. b. cars Seattle. Credit in force to August
1st, confirmed and irrevocable. Advice Na-
tional Bank of Commerce, your city, credit has
been opened. Charge our account with drafts
drawn thereunder."

(Testimony of H. G. Hotchkiss.)

As instructed by above bank, we have sent a copy of this letter to the National Bank of Commerce, of our city.

Yours very truly,

H. S. DEANE,

HSD-CER

Manager Foreign Dept.

For value received, the undersigned hereby assigns, transfers and sets over to Frank Waterhouse & Company the credit mentioned and referred to in the foregoing letter, and authorizes said assignee to receive all moneys due or to become due under said credit.

Dated Seattle, Washington, May 14, 1920.

INTERNATIONAL TRADING COMPANY OF
AMERICA, INC.

By G. W. Nelson,

Secy. & Treas.

Witness:

E. J. BOXER.

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk.

This letter was turned over to us by Waterhouse & Co. Mr. Boxer and Mr. Nelson were very busy at that time getting sales of sugar, and Mr. Boxer made the remark that he would send over a million dollars worth of sugar through our bank, and that these credits were expected any day and they would ask us to cable increasing the original credit.

(Testimony of H. G. Hotchkiss.)

Customarily the guarantee is signed the day following the credit being issued, but in view of the fact that we expected additions to this letter of credit, we were waiting until it was complete before having the guarantee signed. The standing of Waterhouse & Co. was at that time absolutely first-class. According to my best recollection, it was within two or three days of May 22d when Waterhouse & Co. executed this guarantee.

There was nothing in the documents accompanying the draft that showed a separation of the Montgomery, Ward & Co. shipment from the Sexton shipment. It was entirely one shipment. Mr. R. D. Smalley, Treasurer, signed the guarantee for the Waterhouse Company in my presence.

We have presented the one assignment to Waterhouse of the letter of credit from the Chicago bank to the International (Defendant's Exhibit "A-1") which Waterhouse delivered to the bank, and a similar transaction occurred as to the other shipment.

Redirect Examination.

The Montgomery, Ward & Co. draft was paid on July 22d and [47] we paid the Kelley draft on July 23d. That was the purpose of the thirty-day acceptance, so that we could collect the money before we paid it out. That is the practice of good banks. At the time we paid the Kelley draft, we had presented the draft on the Sexton shipment and it had been refused.

(Testimony of H. G. Hotchkiss.)

Recross-examination.

The Kelley draft was payable in thirty days from the date we accepted it. We accepted it on June 23d. We collected the Montgomery, Ward & Co. payment on July 22d at about 1:30. The writ of garnishment was served at 2 P. M. After collecting the money on the Montgomery, Ward & Co. draft I took the Sexton letter of credit to the Seattle National Bank and it was refused on instructions from Chicago. We paid the Kelley & Co. draft the next day.

Redirect Examination.

After this transaction was all over there was an agreement or understanding with the Waterhouse Company, or some of its officers, that any loss on the whole transaction would be shared equally between the bank and Waterhouse. There was no writing that I ever saw.

(Here plaintiff rested.)

Testimony of R. D. Smalley, for Garnishee Defendant.

R. D. SMALLEY, produced as a witness for the garnishee defendant, being first duly sworn, testified as follows:

I was treasurer of Frank Waterhouse & Co. in 1920. The signature on the back of Plaintiff's Exhibit No. 7 is mine. I executed it some time after the date appearing on it, May 17th, on behalf of Frank Waterhouse & Co. I would say it

(Testimony of R. D. Smalley.)

was three or four days after May 17th, but by listening to the testimony I would say that it was three or four days after May 22d. I fix the time that I signed it because Mr. Hotchkiss said that [48] was the time he put the last amount in there. I executed the agreement after the last amount was put in, just as it shows there. I was not very familiar with the transactions that were going on at the time with reference to the different purchases and sales of sugar. I know that there were a number of sales being made, but I didn't delay signing for that reason. I never did sign these things until the bank called me up and said to come down and sign them, that they were ready. I signed after all the shipments were accounted for as it is now.

Cross-examination.

When I signed the guarantee I examined the face of the letter and noticed that it called for certain shipments of sugar. I did not examine the documents when they arrived.

Testimony of H. G. Hotchkiss, for Defendant (Recalled).

H. G. HOTCHKISS, being recalled as a witness on behalf of the defendant, testified as follows:

After the Seattle National Bank had refused to pay the draft on the Sexton sugar, it was sold in Chicago for the best price obtainable, for \$17,-896.32. We had paid on the Sexton sugar \$38,-497.02.

(Testimony of R. D. Smalley.)

On the Montgomery, Ward & Co. transaction there was a net profit of \$10,673.56, so that there was a net loss of \$9,927.44 on the two transactions.

The COURT.—There being no objections, I will take judicial notice of the judgment in this suit.

Testimony of R. D. Smalley, for Garnishee Defendant (Recalled).

R. D. SMALLEY, recalled as a witness on behalf of the garnishee defendant, testified as follows:

Frank Waterhouse & Co. took no action to have distributed to it any profit out of the Montgomery, Ward & Co. deal.

Testimony of H. G. Hotchkiss, for Garnishee Defendant (Recalled).

H. G. HOTCHKISS, being recalled as a witness on behalf of the garnishee defendant presented a statement prepared by him, treating the Montgomery, Ward & Co. deal and the John Sexton & [49] Co. deal as one transaction, and it was admitted, by consent as a correct statement and marked Defendant's Exhibit "A-3."

Defendant's Exhibit No. "A-3."**STATEMENT ON ACCOUNT OF LETTER OF
CREDIT #1128****Disbursements**

Acceptance paid account of Letter of	
Credit	244,970.46
Duty	15,441.31
8% interest July 20 to July 23.....	10.30
Freight to Chicago	1,364.41
Demurrage	18.54
Filing complaint	5.00
	<hr/>
Total	261,810.02

Receipts

Received from Dexter Hor-	
ton National Bank....	233,970.52
Received net amount sale	
390 bags of sugar	9,298.59
Received net amount sale	
360 bags of sugar	8,597.73
	251,866.84
	<hr/>

Net Loss—\$9,943.18

[Endorsed]: No. 4072. United States Circuit
Court of Appeals for the Ninth Circuit. Filed Aug.
4, 1923. F. D. Monckton, Clerk.

Testimony of R. D. Smalley, for Garnishee Defendant (Recalled).

R. D. SMALLEY, being recalled as a witness on behalf of the garnishee defendant, testified as follows:

In 1920, I opened letters of credit on account of Frank Waterhouse other than this one. They were opened sometimes by letter and sometimes by telephone. After they were issued they would call me up and say "I want you to come down and sign this guarantee."

Testimony closed.

Thereupon the case was argued to the court and following such argument the case was reopened and the following further testimony was admitted:

Testimony of H. G. Hotchkiss, for Garnishee Defendant (Recalled).

H. G. HOTCHKISS, being recalled as a witness for the garnishee defendant, testified as follows:

Cross-examination.

The draft (Plaintiff's Exhibit 11) after acceptance, was returned to the National Bank of Commerce. The documents remained with me. The draft was accepted June 23d and was paid July 23d. Some time after acceptance and before payment, Mr. Boxer, who is the manager of the foreign department of Frank Waterhouse & Co., but is not an officer of that company, examined and checked all the documents called for in the letter

(Testimony of H. G. Hotchkiss.)

of credit except the draft. I cannot give you the substance of our conversation. I don't know what he said.

Redirect Examination.

When I showed him these documents, Mr. Boxer did not raise any question about our paying the draft, made no objection to it.

Recross-examination.

This was after we had accepted the draft and delivered it to the National Bank of Commerce but before it was paid. The bank was liable as soon as it was accepted. Our liability to the holder of the draft was fixed upon the acceptance. [50]

The COURT.—There was nothing in this case at the time it opened, in your opening statements, to apprise the Court of the importance of the question of the conformity of these documents to the letter of credit; nothing was said in opening the case that it was claimed that any part of this shipment did not measure up to the contract made by the letter of credit. Therefore the action of the Court yesterday in sustaining the objection to the question about this talk that Mr. Hotchkiss had with the representative of Waterhouse & Company.

Whether this arrangement between Nelson and Waterhouse & Company is treated as a partnership or a joint adventure or joint enterprise, or whatever you may designate it, I am convinced that Waterhouse & Co. was the fully authorized agent of the International Trading Company to make whatever arrangements were necessary with

the bank in order to secure finances. That being true, this guaranty that was put on the back of the letter of credit was the final step in securing the money. If it is not looked at as contemplated in the first borrowing, the agency would authorize Waterhouse & Company to guarantee and pledge and give a lien on the whole proceeds of the transaction to secure the bank in making the arrangement for the money, and I find that everything was pledged by that guaranty on the back of the letter of credit.

Now, it has been argued that afterwards, in borrowing the \$500, there was a recognition that these were separate deals and separate transactions and to be kept separate in every way. That does not follow. If the International and Nelson wanted to pledge a part of what was to be realized out of these deals with his customer, for his own convenience, that could be done, without showing any intention to recognize the guaranty on the back of the letter of credit in any other way [51] than pledging everything.

Regarding this question of the documents: If Waterhouse & Company were guarantors and nothing else, there might be and would be a more serious question in the case. Of course the suit between the National City Bank and the Seattle National Bank is another story. What makes this governed by another rule is this fact, that is, that Waterhouse & Company were interested not only in the documents but they were interested in the sugar; and although the National City Bank had

accepted the Kelley draft, yet I am convinced from the evidence in this case that Waterhouse & Company, when the documents were presented—and the Court must conclude that they had notice that they did not exactly conform—assuming that they did not conform, that it was then the duty of Waterhouse & Company, representing its own interest and that of the partnership or the other company associated with it in the enterprise—it was then the duty of Waterhouse & Company to notify the bank that the sugar belonged to the bank, that Waterhouse & Company had no further interest in it and they could dispose of it as they pleased, but instead of that it appears clear to the Court that they were willing to take a chance on the sugar yet. Well, they could not do that and later, when there was a loss on the sugar, repudiate the whole thing and come in and take the other tack. The findings will be in favor of the garnishee defendant. An attorney fee of \$250 is not unreasonable. [52]

Afterwards, to wit, on the 21st day of December, 1922, the parties hereto, by their respective counsel, again appeared before said Court, and thereupon the following proceedings were had:

Counsel for plaintiff presented to the Court certain requests in writing for rulings on the legal sufficiency of the evidence, for certain special findings and declarations of law and that judgment be entered in favor of the plaintiff and against the garnishee defendant, and they and each of them were by the Court severally denied

upon the merits because the Court deemed that the same, under the evidence in this case, and the law applicable thereto, were not well taken. To which rulings, counsel for plaintiff then and there duly excepted and such exceptions were allowed by said Court.

The Court thereupon endorsed upon said written requests, its refusal of the same as aforesaid, and the allowance of such exceptions and such requests with such refusals and allowance were duly filed in this cause and made a part of the record.

Thereupon the Court signed general findings in said cause and the judgment herein, to which findings and judgment counsel for plaintiff duly excepted and said exceptions were allowed by the Court. Such exceptions and allowance were in writing and were filed in this cause and made a part of the record.

The foregoing contains all the evidence received upon the trial of this cause relating to and material to the foregoing exceptions, and said plaintiff prays that it may be allowed settled and signed as his bill of exceptions herein.

HADLEY, HAY & HADLEY,

Attorneys for Plaintiff. [53]

Service of the within is accepted and receipt of copy admitted this 30th day of April, 1923.

ALMON RAY SMITH,

Attorney for Gar. Def.

[Endorsements]: Filed May 16, 1923. [54]

[Caption and Title.]

Order Settling Bill of Exceptions.

This cause having come on regularly before the Court on this 15th day of May, 1923, upon the application of plaintiff for the settling and certifying of his proposed bill of exceptions lately filed herein, and the time for presentment of such bill for settlement having been duly extended from time to time by stipulation of the parties and orders of this Court and said proposed bill having been duly presented and served within the time so extended, and service of a copy of said proposed bill having been served on the attorneys for the defendant on the 30th day of April, 1923, and no amendments thereto having been proposed or filed, and the time for proposing such amendments having elapsed, on motion of Messrs. Hadley, Hay & Hadley, attorneys for plaintiff, it is ordered, that said proposed bill of exceptions, including the several exhibits, motions, requests, and exceptions referred to therein, and on file herein, be and the same is hereby allowed, approved and settled as the true and correct bill of exceptions in this cause, and that when filed, it be made a part of the record therein.

EDWARD E. CUSHMAN,
Judge.

O. K.—ALMON RAY SMITH,
Atty. for Gar. Def. [55]

[Endorsements]: Filed May 16, 1923. [56]

[Caption and Title.]

Request of Plaintiff for Rulings on Legal Sufficiency of the Evidence and for Findings.

The plaintiff moves the Court as follows:

1. For a declaration of law that the contracts for the purchase of sugar, as shown in this case, were severable, separate and distinct, and the subsequent contracts of sale by the defendant International Trading Company, to wit, to Montgomery, Ward & Co. and to John Sexton & Co. were separate and distinct, and that the agreements with Frank Waterhouse & Company and the National City Bank were separate and distinct contracts, covering said respective shipments of sugar and the resale thereof by the International Trading Company.

2. For a declaration of law that the National City Bank, under the method in which it dealt with this sugar, its letter of credit, and the sugar shipments referred to therein, is estopped to deny that the said shipments were separate and distinct contracts. [57]

3. For a declaration of law, on the evidence in this case, that by accepting the documents drawn against the letter of credit issued by the National City Bank, the National City Bank acted at its peril. That as said documents did not conform to the said letter of credit, the acceptance thereof and the acceptance of the draft drawn under said letter of credit, without informing the Waterhouse Company or submitting said documents and draft to

Frank Waterhouse & Company, discharged said Waterhouse & Company as guarantors on said letter, and that, in any event, the acceptance by the National City Bank of said draft should have been a qualified one to the extent only that said draft was in payment of 500 tons of said sugar, which was to be reshipped to Montgomery, Ward & Company. That by reason of the release of said guarantor, Frank Waterhouse & Company, The National City Bank became indebted to the International Trading Company in the sum of two-thirds of the sum of \$10,673.26, which profit said bank had received on the resale of 500 tons of said sugar to Montgomery, Ward & Company.

4. For a declaration of law that the National City Bank recognized and accepted the interest of the International Trading Company in and to the extent of two-thirds of the sum of \$10,673.26 by taking an assignment of the interest of said International Trading Company in and to a contract relative to the division of said profits with Frank Waterhouse & Company.

5. For a declaration of law that, under the undisputed evidence in the case, the various contracts [58] between Frank Waterhouse & Company and the International Trading Company were separate and distinct, all of which was known to the National City Bank, and that there was no partnership or general adventure relation existing between Frank Waterhouse & Company and the International Trading Company in either the purchase of sugar from the Orient or the resale thereof

to Montgomery, Ward & Company in one case and to John Sexton & Company in the other, and that no relation of principal and agent existed between the Waterhouse Company and the International Trading Company.

6. For a ruling that under the undisputed testimony in this case, the National City Bank was, at the time of the service of the writ of garnishment upon it, indebted to the defendant International Trading Company, in a sum equivalent to two-thirds of \$10,673.26.

7. For a ruling that, under the undisputed testimony in this case, neither Frank Waterhouse & Company nor the International Trading Company had any notice of nonconformity of documents presented, covering the quality, description and analysis, against the letter of credit issued by the National City Bank at any time up to and including the acceptance of the draft likewise drawn under said letter of credit.

8. For a ruling that, under the undisputed evidence in this case, after the acceptance of the draft drawn against the National City Bank under its letter of credit, it was in no manner prejudiced by any action or lack of action by either Frank Waterhouse & Company or the International Trading Company. [59]

9. For a ruling of law, under the undisputed testimony in this case, that plaintiff is entitled to judgment against the garnishee defendant, in the sum of \$5,200.00, together with interest thereon

at the rate of 6% per annum from July 7, 1920, and for its costs.

HADLEY, HAY & HADLEY,
Attorneys for Plaintiff.

The foregoing requests were duly and timely presented to the Court before the entry of judgment herein, and they and each of them are severally denied upon the merits and because the Court deems that the same, under the evidence in this case and the law applicable thereto, are not well taken, to which rulings the plaintiff excepts and exceptions are allowed.

Done in open court this 21st day of December, 1922.

EDWARD E. CUSHMAN,
Judge.

[Endorsements]: Filed Dec. 21, 1922. [60]

[Caption and Title.]

**Exceptions of Plaintiff to Findings of Fact and
Conclusions of Law.**

I.

Plaintiff excepts to finding of fact No. 1 as proposed in this action, on the ground that the same is not supported by the evidence and the law in this action.

II.

Plaintiff excepts to finding of fact No. 2 on the ground that the same is not supported by the evidence and the law in this action.

III.

It excepts to finding of fact No. 3 on the ground that the same is not supported by the law or the evidence in this action.

IV.

It further excepts to conclusion of law No. 1 on the ground that the same is not supported by the evidence in this action or the law applicable thereto.

V.

It excepts to conclusion of law No. 2 for the reason that the same is not supported by the evidence and the law applicable thereto in this action.

HADLEY, HAY & HADLEY,

Attorneys for Plaintiff. [61]

The foregoing exceptions, and each and every one of the same, were presented to the Court before the Court made its findings of fact and conclusions of law herein, and each and every one of said exceptions were severally denied because the Court deems the same, under the evidence in this case and the law applicable thereto, not well taken, and to each of said rulings the plaintiff excepts, and its exceptions are hereby allowed.

Done in open court this 21st day of December, 1922.

EDWARD E. CUSHMAN,

Judge.

[Endorsements]: Filed Dec. 21, 1922. [62]

[Caption and Title.]

Assignment of Errors.

Comes now the plaintiff and files the following assignment of errors upon which he will rely in his prosecution of the writ of error in the above-entitled cause, to wit:

I.

The said Court erred in refusing plaintiff's request No. 1 on file herein for a declaration of law.

II.

The said Court erred in refusing plaintiff's request No. 2 on file herein for a declaration of law.

III.

The said Court erred in refusing plaintiff's request No. 3 on file herein for a declaration of law.

IV.

The said Court erred in refusing plaintiff's request No. 4 on file herein for a declaration of law.

V.

The said Court erred in refusing plaintiff's request No. 5 on file herein for a declaration of law.

VI.

The said Court erred in refusing plaintiff's request No. 6 on file herein for a ruling of law. [63]

VII.

The said Court erred in refusing plaintiff's request No. 7 on file herein for a ruling of law.

VIII.

The said Court erred in refusing plaintiff's request No. 8 on file herein for a ruling of law.

IX.

The said Court erred in refusing plaintiff's request No. 9 on file herein for a ruling of law.

X.

The Court erred in making its finding of fact No. 1.

XI.

The Court erred in making its finding of fact No. 2.

XII.

The Court erred in making its finding of fact No. 3.

XIII.

The Court erred in making its conclusion of law No. 1.

XIV.

The Court erred in making its conclusion of law No. 2.

XV.

The Court erred in rendering judgment for the garnishee defendant and against plaintiff.

Wherefore, the said Martin Rozema, plaintiff in error, prays that the judgment of the District Court of the United States for the Western District of Washington, Northern Division, be reversed and that a judgment be directed to be entered for the plaintiff or that a new trial be granted.

HADLEY, HAY & HADLEY, BAUSMAN, OLDHAM, BULLITT & EGGERMAN,

Attorneys for Plaintiff.

[Caption and Title.]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 72, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing cause, as is required by stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled [73] cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.), for making
record, certificate or return, 173 folios
at 15¢..... \$29.95

Certificate of Clerk to transcript of record,	
4 folios at 15¢.....	.60
Seal to said certificate .....	.20
Certificate of Clerk to original exhibits,	
3 folios at 15¢.....	.45
Seal to said certificate.. .....	.20

I hereby certify that the above cost for preparing and certifying record, amounting to \$27.40, has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error filed on July 11, 1923, on which date a copy of the same was lodged in my office for the defendant in error, and the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 1st day of August, 1923.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western Dis-
trict of Washington. [74]

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Martin Rozema, Assignee of the Judgment of The Hale Company, a Corporation, Against the International Trading Company, a Corporation, Plaintiff in Error, vs. National City Bank of Seattle, a National Banking Corporation, Garnishee, Defendant in Error. Transcript of Record. Upon Writ of Er-

ror to the United States District Court of the Western District of Washington, Northern Division.

Filed August 4, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 4072.

MARTIN ROZEMA, Assignee of the judgment of
THE HALE COMPANY, a Corporation,
against the INTERNATIONAL TRADING
COMPANY, a Corporation,

Plaintiff in Error,

vs.

NATIONAL CITY BANK OF SEATTLE, a Na-
tional Banking Corporation, Garnishee,

Defendant in Error.

Stipulation Re Printing Record.

It is hereby stipulated and agreed by the above-named plaintiff and defendant in error, by their respective attorneys, as follows:

First. That inasmuch as Plaintiff's Exhibit 12 contains nine separate certificates of analysis covering 5258 bags of sugar, which certificates are all in similar form and of similar import except as to the number of bags covered by each certificate

and the origin and number of each set of bags, and inasmuch as Plaintiff's Exhibit 13 contains nine certificates of weights, being one certificate for each set of bags above mentioned, and that all of said certificates of weights are also of similar form and import except as to the number of bags covered by each certificate and their respective weights, only one of said certificates of analysis and only one of said certificates of weights shall be printed.

Second. That in printing the record in this case there shall be omitted the caption and title of every document and paper except the one found on page 2 of the certified record, and the one found on page 25 of such record, and the words "Caption and Title," and the name of the paper or document shall be substituted therefor.

Third. That endorsements other than file-marks may be omitted, and the word "Endorsements" printed in lieu thereof.

Fourth. That in printing the record, a copy of each exhibit may be inserted and printed in that part of the bill of exceptions wherein it is referred to as having been admitted in evidence.

Fifth. That the following documents and papers in the certified record be omitted, viz.:

	Record page.
1. Notice of assignment of judgment,	18
2. Petition for new trial, filed Jan. 31, 1923	30
3. Order denying same, filed Apr. 2, 1923	33
4. Order extending time for filing bill of exceptions, dated and filed Apr. 17, 1923	34
5. Similar order, dated and filed May 1, 1923	36

6. Petition for writ of error, order allowing same
and fixing amount of bond, filed July 11,
1923 65
7. Writ of error, filed July 11, 1923 75
8. Bond and approval, filed July 11, 1923
9. Citation with proof of service, filed July 12,
1923 76
10. Waiver of joinder on appeal, filed July 11,
1923 69
11. Praecipe for transcript, filed July 13, 1923 71
12. Order sending up original exhibits, 70

It is further stipulated and agreed that the documents and papers above mentioned to be omitted from the printed record may be referred to by counsel or the Court, if deemed necessary in the course of the argument, or otherwise, during the disposition of the cause.

HADLEY, HAY & HADLEY,
Attorneys for Plaintiff in Error.

ALMON RAY SMITH and POE, FALKNOR &
FALKNOR,

Attorneys for Defendant in Error.

[Endorsed]: No. 4072. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 4, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 4072

MARTIN ROZEMA, Assignee of the Judgment of
THE HALE COMPANY, a corporation, against
INTERNATIONAL TRADING COMPANY OF
AMERICA, a corporation, *Plaintiff in Error*

vs.

THE NATIONAL CITY BANK OF SEATTLE,
a National Banking Corporation, Garnishee Defend-
ant, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, JUDGE

BRIEF OF PLAINTIFF IN ERROR

HADLEY, HAY & HADLEY
BAUSMAN, OLDHAM, BULLITT & EGGERMAN
Attorneys for Plaintiff in Error

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 4072

MARTIN ROZEMA, Assignee of the Judgment of
THE HALE COMPANY, a corporation, against
INTERNATIONAL TRADING COMPANY OF
AMERICA, a corporation, *Plaintiff in Error*

vs.

THE NATIONAL CITY BANK OF SEATTLE,
a National Banking Corporation, Garnishee Defendant,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, JUDGE

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This is a garnishment proceeding commenced in the United States District Court for the Western District of Washington, Northern Division, against the National City Bank of Seattle, as garnishee

defendant, by The Hale Company, a corporation, plaintiff, upon a judgment for \$5,200 (Record p. 1) obtained in said court by said The Hale Company, against the International Trading Company of America, Inc. (Rec. p. —), which judgment was assigned to Martin Rozema, the present plaintiff, since the commencement of such proceeding. (Record p. 18.)

The case was tried before the court without a jury and findings in favor of said bank, as garnishee defendant, were made and filed (R. p. 24), and judgment in its favor was thereupon entered. (R. p. 25.) After the conclusion of the evidence and before the findings were signed, the plaintiff below made and filed requests for certain special findings and declarations of law. These were all refused and exceptions thereto, as well as exceptions to the findings, were duly taken and allowed. (See Rec. pp. 78, 79, 80, 81, 82.) The bill of exceptions contains all the evidence received upon the trial relating to and material to such exceptions. (R. pp. 27-81.) It also includes the court's opinion. (See R. p. 75.)

The affidavit for the writ of garnishment is in the usual form. (See R. p. 3). The bank by its answer (R. p. 6) denies liability but admits that

it has in its hands the sum of \$10,673.26 as the net profits on the sale of certain sugar to Montgomery Ward & Co., and that it holds an assignment of the interest of the International Trading Company in said net proceeds as security for a loan of \$500.00. It claims, however, that it has an off-set against such net proceeds for certain disbursements made by it in connection with a certain sugar deal with John Sexton & Co. This answer was duly controverted. (See R. p. 20.)

The undisputed evidence produced upon the trial shows:

1. That in the early part of May, 1920, the International Trading Company, engaged in the importing and exporting business, sold to Montgomery Ward & Co. of Chicago, 500 tons of "White Granulated Sugar," for immediate shipment by Kelley & Company, from Hongkong, China. To provide for the payment of such sugar upon its arrival in Seattle, Montgomery Ward & Co., established an irrevocable letter of credit in Seattle for \$234,000 in favor of the International Trading Company aforesaid. This letter of credit called for "White Granulated Sugar." (See Plaintiff's Exhibit No. 2, Record p. 32.)

2. In order to have such sugar shipped from Hongkong, it became necessary for the International Trading Company to have established a letter of credit in Hongkong, and it applied to said The National City Bank for that purpose. The bank refused to issue such letter, giving as a reason that the sugar market was speculative at that time and because the International Trading Company did not have sufficient credit standing. It suggested, however, that the International Trading Company see Frank Waterhouse & Co., stating that it might cost them some of their profits, but they thought Frank Waterhouse could handle the transaction for them. (See R. p. 28.)

3. The International Trading Company thereupon made a contract with Frank Waterhouse & Co. of which the following is a copy:

“FRANK WATERHOUSE & CO.
SEATTLE, U. S. A.

May 13, 1920.

“International Trading Company of America, Inc.,
Seattle, Washington.

“Gentlemen:

“Acting upon your request of the 13th inst., we agree to assist you in transferring funds covering sales made by you to Montgomery Ward & Co., Chi-

cago, of 500 tons sugar from Hongkong, this sugar having been purchased by you from Kelley & Company, Limited, Hongkong.

"In assisting you to transfer funds enabling you to complete the deal as between buyer and seller, it is distinctly understood that all purchases and sales of the above mentioned sugar were handled solely by you and your associates, and that our only interest in this matter is in the transfer of finances.

"In consideration of our assisting you in transfer of finances you agree to allow us a fee of one-third (1-3) of the net profit on this deal; all letters of credit are to be assigned to us thru our banking connections, finances will be handled and on the consummation of this deal, when sugar arrives and is shipped from Seattle and all drafts are paid, we will then render an accounting to you, deducting from the gross profits any expenses incurred, viz., telegraph and cable charges, interest charges, etc., and of the remaining balance we will remit to you two-thirds (2-3).

Yours very truly,
FRANK WATERHOUSE & COMPANY,
By E. J. BOXER,
Mgr. Domestic Trade Dept.

Accepted.

International Trading Company of America, Inc.
By G. W. Nelson,
Secretary and Treasurer."

(See Plaintiff's Exhibit No. 1, Record p. 29.)

4. After entering into such contract, and pursuant to its terms, the International Trading Company assigned its Montgomery Ward & Co. letter of credit to Frank Waterhouse & Co., which concern endorsed it over to the bank, and instructed the bank to open the required letter of credit in Hongkong. This the bank did on May 17, 1920, sending the following cable:

“5-17-20.

“International Banking Corporation,
Hongkong, China.

“Will accept drafts at 30 days sight drawn by Kelley & Co., Ltd., covering 500 tons standard white granulated sugar packed in double bags quality net shipping weights guaranteed by Lloyds and with Hongkong government certificates of inspection and analysis full set bills of lading endorsed in blank invoice consular invoice attached 210,000 dollars C. I. F. Seattle draft must be drawn and shipment from Hongkong prior to June 1, 1920.

“THE NATIONAL CITY BANK.”

(See Plaintiff's Exhibit No. 6, Record p. 42.)

The International Trading Company had no other orders for sugar at that time and there was nothing said about other orders for sugar. The Montgomery Ward & Co. order was the only one in consideration at that time. (See Record pp. 31, 44.)

5. Within two or three days after the contract between the International Trading Company and Frank Waterhouse & Co., had been entered into, the International showed it to the bank. (See R. p 31.)

6. On May 19, 1920, the International Trading Company received an order for 155 tons of sugar from John Sexton & Co., of Chicago (R. p. 37), which was likewise to be immediately shipped from Hongkong, and they established an irrevocable letter of credit in Seattle in favor of the International Trading Company for \$72,850.00 to provide for the payment of the sugar upon its arrival in Seattle. This letter of credit called for "*Standard White Granulated Sugar.*" (See Plaintiff's Exhibit No. 10, Record p. 53.)

On May 22, 1920, the International Trading Company entered into a contract with Frank Waterhouse & Co., which was dated May 22, 1920, but otherwise similar in every respect to the contract between these parties, dated May 13, 1920, in regard to the Montgomery Ward & Co. transaction, with the exception of the amount of sugar which was stated to be 155 tons and the name of the buyer which was stated to be John Sexton & Co., of Chicago. (See Plaintiff's Exhibit No. 5, Record p. 38.)

After entering into this contract, and pursuant to its terms, the International Trading Company assigned the said John Sexton & Company letter of credit to Frank Waterhouse & Co., which concern in turn assigned it over to the bank, and the bank thereupon increased its credit in Hongkong by \$65,-100.00 to cover the sugar ordered by John Sexton & Company, by the following cable:

“May 22, 1920.

“International Banking Corporation,
Hongkong, China.

“Referring to our telegram 17th, Kelley & Co. Ltd. letter of credit it is irrevocable increase it 150 tons 5 tons 65000 100 dollars.

“NATIONAL CITY BANK OF SEATTLE.”

(See Plaintiff's Exhibit No. 9, Record p. 51.)

7. In between the Montgomery Ward & Co. transaction and the Sexton & Company transaction, there was a similar transaction in regard to a 305 ton order from a St. Paul house, which caused the bank to increase its credit in Hongkong by \$128,000, but this order was never filled, and it is of no importance in this case. It is only mentioned here to explain the reference to it in the letter of credit pre-

pared by the bank. (See Plaintiff's Exhibit No. 7, Record p. 44, and next paragraph, *post.*)

8. It is customary in issuing letters of credit for the issuing or drawing institution to give a telegraphic or cable advice that it is issuing the letter of credit, and then to forward the letter of credit to the party in whose favor it is drawn, or to some banking institution at the point where the credit is to be utilized. This is done when the mail will reach there in time, but in this case it would not. The shipment had to leave on June 1st, and it was impossible to get it through before that date. The cables that were sent were the only advices that were sent by the bank to the Orient as to the terms and conditions and the manner in which the letter was being opened, and the bank had no other communication with Kelley & Co. or the International Banking Corporation in Hongkong than is shown by these cables. (See R. p. 63.)

On May 17, 1920, the bank had prepared a formal letter of credit, on account of Frank Waterhouse & Co., for \$210,000, covering the 500 tons of sugar sold by the International Trading Company to Montgomery Ward & Co. (see Plaintiff's Exhibit No. 7, Record p. 44), but this letter of credit was never forwarded to the Orient, and afterwards two

accounts were added to it by interlineation: \$128,000 covering the 305 tons sold to the St. Paul house and mentioned in paragraph 6, *supra*, and \$65,100 covering the sugar sold to John Sexton & Co.

Some time after May 22, 1920, and after the cable increasing the credit by \$65,100 had been sent, Frank Waterhouse & Co. signed the guarantee on the reverse side of said formal letter of credit, which was kept by the bank. (See R. p. 69, Plaintiff's Exhibit No. 7, Record p. 7. 46.)

The International knew nothing of this transaction, of this attempted combination of these transactions into one letter of credit, but understood that there was more than one letter of credit issued. It never saw the formal letter of credit and learned only a few days before the trial that there had been only one letter of credit issued. (See R. pp. 40, 41.)

9. The transactions in regard to the credits established in Hongkong were wholly between the bank and Frank Waterhouse & Co. They were established on account of Frank Waterhouse & Company solely. These credits were guaranteed by Frank Waterhouse & Co. alone and the bank did not look to the International Trading Company. It gave exclusive credit to Frank Waterhouse & Co. and had no contractual relations with the International

Trading Company whatever. (R. p. 63.) Furthermore, the bank, in all these dealings, had positive notice and knowledge of the relations between the International Trading Company and Frank Waterhouse & Co. and of their respective rights in the profits of these several transactions. (R. pp. 28, 31, 34, 35.)

10. On or about June 5, 1920, the International Trading Company applied to the bank for a loan of \$500.00 and the bank suggested that it be given an assignment of the two-thirds interest which the International Trading Company had in the Montgomery Ward & Co. transaction as collateral security for such loan, and thereupon an assignment or order was prepared at the dictation of the bank. This assignment or order was approved by Frank Waterhouse & Co. and, with the \$500 note, was delivered to the bank as collateral security thereto (see Plaintiff's Exhibits Nos. 3 and 4, R. p. 34, 35), and accepted by the bank as such. Furthermore, this note and order was accompanied by a copy of the contract between the International Trading Co. and Frank Waterhouse & Co., dated May 13, 1920, covering the Montgomery Ward & Co. transaction. (See R. p. 37.)

11. On June 23, 1923, a thirty-day draft for \$244,000 from Kelley & Co. of Hongkong, covering both the Montgomery Ward & Co. shipment and the John Sexton & Co. shipment, was presented to The National City Bank for acceptance. The draft was accompanied by certain documents called for by the cabled credits and also called for by the John Sexton & Co. letter of credit, and among these documents was the Hongkong government certificate of analysis. This certificate described the sugar as "Granulated White Sugar (Java No. 24)" and "Sugar (Direct Polarization) 98.5%." Yet, notwithstanding the fact that the John Sexton & Co. letter of credit called for "*Standard White Granulated Sugar*", and, notwithstanding the fact that the bank's own cabled credits and its formal letter of credit called for "*Standard White Granulated Sugar*," the bank accepted the draft without any reservation, and thereby became irrevocably bound to pay it at the end of thirty days. (See R. pp. 62, 63, 73.)

The bank did not notify or consult the International Trading Company prior to the acceptance of the draft, or at any time thereafter, because it was not looking to the International, (see R. p. 63), but neither did it notify or consult Frank Waterhouse & Co., either before or after the acceptance of the

draft. It accepted the draft at its own risk and on its own responsibility.

There is testimony to the effect that *after the draft had been accepted*, the manager of the foreign department of Frank Waterhouse & Co., not an officer of the company, had examined the documents in question (R. p. 72), but there is no evidence whatever that he discovered or noticed the discrepancy in question or that his attention was in any way called to it, neither is there any evidence that he saw the letter of credit or the cables or that he was familiar with their terms. Indeed there is no evidence that the bank itself had discovered the discrepancy at that time.

12. The sugar for Montgomery Ward & Co. and the sugar for John Sexton & Co. arrived in Seattle on July 16, 1920, in one shipment. The Montgomery Ward & Co. letter of credit called for "Granulated White Sugar" and as the description of the sugar in the Hongkong government certificates conformed to such letter of credit, the draft on this letter of credit was promptly honored on July 22, 1920 (R. p. 67), but as to the John Sexton & Co. sugar, the said certificates not conforming to the John Sexton & Co. letter of credit, which called for "*Standard*

White Granulated Sugar", payment was refused on the same day. (R. p. 68.)

13. The net profit on the Montgomery Ward & Co., transaction was \$10,673.26. (R. p. 70.) The sugar destined for John Sexton & Co. was sold by the bank on the open market in Chicago and the loss sustained thereon was \$20,600.70. (R. pp. 69, 70.)

14. The bank paid the Hongkong draft for \$244,000 on July 23, 1920, which it had accepted thirty days before that date. (R. p. 67.)

15. Frank Waterhouse & Co. has taken no action towards having distributed to it any of the profits of the Montgomery Ward & Co. transaction and it has agreed with the bank to share the loss equally. (R. p. 68.)

16. Immediately after payment on the Montgomery Ward & Co. transaction had been made to the bank it was served with a writ of garnishment in this proceeding. (R. p. 68.)



SPECIFICATIONS OF ERROR

1. The court erred in refusing plaintiff's request No. 1, viz:

"For a declaration of law that the contract for the purchase of the sugar, as shown in this case, were severable, separate and distinct, and the subsequent contracts of sale by the defendant International Trading Company, to-wit, to Montgomery Ward & Co. and to John Sexton & Co., were separate and distinct, and that the agreements with Frank Waterhouse & Company and the National City Bank were separate and distinct contracts, covering said respective shipments of sugar and the re-sale thereof by the International Trading Company." (R. p. 78.)

2. The court erred in refusing plaintiff's request No. 2, viz:

"For a declaration of law that the National City Bank, under the method in which it dealt with this sugar, its letter of credit, and the sugar shipments referred to therein, is estopped to deny that the said shipments were separate and distinct contracts." (R. p. 78.)

3. The court erred in refusing plaintiff's request No. 3, viz:

"For a declaration of law, on the evidence in this case, that by accepting the documents drawn

against the letter of credit issued by the National City Bank, the National City Bank acted at its peril. That as said documents did not conform to the said letter of credit, the acceptance thereof and the acceptance of the draft drawn under said letter of credit without informing the Waterhouse Company, or submitting said documents and draft to Frank Waterhouse & Company, discharged said Waterhouse & Company as guarantors on said letter of credit, and that in any event, the acceptance by the National City Bank of said draft should have been a qualified one to the extent that only said draft was in payment of 500 tons of sugar, which was to be re-shipped to Montgomery Ward & Co. That by reason of the release of said guarantor, Frank Waterhouse & Company, The National City Bank became indebted to the International Trading Company in the sum of two-thirds of the sum of \$10,673.26, which profit said bank had received on the re-sale of 500 tons of said sugar to Montgomery Ward & Company.” (R. p. 78.)

4. The court erred in refusing plaintiff’s request No. 4, viz:

“For a declaration of law that the National City Bank recognized and accepted the interest of the International Trading Company in and to the extent of two-thirds of the sum of \$10,673.26 by taking an assignment of the interest of said International Trading Company in and to a contract relative to the division of said profits with Frank Waterhouse & Company.” (R. p. 79.)

5. That the court erred in refusing plaintiff's request No. 5, viz:

"For a declaration of law that, under the undisputed evidence in this case, the various contracts between Frank Waterhouse & Company and the International Trading Company were separate and distinct, all of which was known to the National City Bank, and that there was no partnership or joint adventure relation existing between Frank Waterhouse & Company and the International Trading Company in either the purchase of sugar from the Orient or the re-sale thereof to Montgomery Ward & Company in one case and to John Sexton & Company in the other, and that no relation of principal and agent existed between the Waterhouse Company and the International Trading Company." (R. p. 79.)

6. The court erred in refusing plaintiff's request No. 6, viz:

"For a ruling that under the undisputed testimony in this case, the National City Bank was, at the time of the service of the writ of garnishment upon it, indebted to the defendant International Trading Company in a sum equivalent to two-thirds of \$10,673.26." (R. p. 80.)

7. The court erred in refusing plaintiff's request No. 7, viz:

"For a ruling that under the undisputed testimony in this case, neither Frank Waterhouse &

Company nor the International Trading Company had any notice of non-conformity of documents presented, covering the quality, description and analysis, against the letter of credit issued by the National City Bank at any time up to and including the acceptance of the draft likewise drawn under said letter of credit.” (R. p. 80.)

8. The court erred in refusing plaintiff’s request No. 8, viz:

“For a ruling that under the undisputed evidence in this case, after the acceptance of the draft drawn against the National City Bank under its letter of credit, it was in no manner prejudiced by any action or lack of action by either Frank Waterhouse & Company or the International Trading Company.” (R. p. 80.)

9. The court erred in refusing plaintiff’s request No. 9, viz:

“For a ruling of law, under the undisputed testimony in this case, that plaintiff is entitled to judgment against the garnishee defendant in the sum of \$5200.00, together with interest thereon at the rate of six per cent per annum from July 7, 1920, and for its costs.” (R. p. 80.)

10. The court erred in making finding of fact No. 1 (R. p. 24), on the ground that the same is not supported by the evidence in this action or the law applicable thereto.

11. The court erred in making finding of fact No. 2 (R. p. 24), on the ground that the same is not supported by the evidence in this action and the law applicable thereto.

12. The court erred in rendering judgment in favor of the garnishee defendant because it is against the law and the evidence. (R. p. 25.)



ARGUMENT

The question in this case is: Does the bank have the right to offset its loss on the John Sexton & Co. transaction against the profits on the Montgomery Ward & Co. deal?

If it does not have such right, the plaintiff is unquestionably entitled to judgment in its favor.

The evidence in the case as shown by the record is all undisputed. We will not ask the court to weigh the evidence but will show that there is no evidence in the case, however favorably construed for the bank, warranting the answering of the above question in the affirmative.

I

Our first contention is that the bank itself was solely to blame for the loss on the John Sexton & Co. transaction.

There would have been no loss if it had done its obvious duty; that is, if it had compared the Hongkong government certificate with the John Sexton & Co., letter of credit, or with its own cables, or its own formal letter of credit. The most superficial examination of these papers would have shown that there was a glaring discrepancy between the description of the sugar in the certificates and that called for by not only the John Sexton & Co. letter of credit but by the bank's own cables and by its formal letter of credit. Any one with half an eye could have seen that a call for "*Standard White Granulated Sugar*" is not met by a sugar described as "*Granulated White Sugar, Java No. 24. Sugar (Direct Polarization) 98.5%,*" and the bank ought to have known, if it didn't know, that a draft drawn on the John Sexton & Co. letter of credit could be refused if the description of the sugar in the certificate did not tally with the description in the letter of credit. The authorities are numerous upon this point. See *National City Bank v. Seattle National Bank*, 209 Pac. 705, (Wash.), and authorities therein cited.

If it was too indolent or too careless to make such examination itself, it might have cleared itself of responsibility by submitting the documents to Frank Waterhouse & Co. before accepting the draft, and obtaining its O. K. on them, or better still, it might have submitted the documents for approval to the Seattle National Bank where the John Sexton & Co. letter of credit was payable. By not taking such precautions, it took all the responsibility and all the risk upon itself and acted upon its peril. It was grossly negligent and inexcusably careless. Under such circumstances it must stand the loss itself, and cannot shift it upon other shoulders. See *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 17 N. E. 217.

The bank does not deny its negligence, and the fact that it agreed with Waterhouse & Co. to stand half the loss indicates that it admitted its liability, for, if it were not liable, why should it stand any part of the loss? Why Waterhouse & Co. should be willing to stand any part of the loss under such circumstances is inexplicable, unless the bank was secretly interested in the profits of Waterhouse & Co. in the transactions, the suspicion of which is strengthened by the fact of the long delay in the execution of the guaranty.

The court below, to meet this situation, in its decision, puts forth a statement of fact and a proposition of law, both of which are erroneous. The statement of fact is that Frank Waterhouse & Co. had notice that the documents did not conform.

If the court meant by this that Frank Waterhouse & Co. had such notice before the draft was accepted, then it is clearly erroneous because the bank made no such claim and its own testimony is positive to the fact that Waterhouse & Co. had no notice prior to the acceptance of the draft. (See R. pp. 62, 72, 73.)

But the court evidently based this statement on the testimony of Mr. Hotchkiss, the cashier of the bank, to the effect that Mr. Boxer, the manager of the foreign department of Frank Waterhouse & Co. examined and checked all the documents called for in the letter of credit except the draft, *after the draft had been accepted* and the liability of the bank had become absolute. (See R. p. 72.)

Aside from the futility of making an examination of the documents *after the draft had been accepted*, it is plain that this does not show notice to Frank Waterhouse & Co., unless it is shown in addition that Mr. Boxer discovered the discrepancy in

question or was notified of it in some way, and there is no evidence of that kind. It does not appear for what purpose Mr. Boxer examined and checked these documents, nor whether he had before him the cables, or the bank's formal letter of credit or the John Sexton & Co. letter of credit, nor does it appear that he was at all familiar with their contents or had ever seen them. Indeed it does not appear that the bank itself, at that time, was aware of the discrepancy.

Upon this supposed notice the court builds up a theory of waiver or estoppel. It is elementary that to work an estoppel or waiver there must be positive proof of actual notice. Mere opportunity to acquire knowledge is not sufficient.

Tennant v. Union Central Life Ins. Co., 112 S. W. 754.

Ocmulgee River Lumber Co. v. Ocmulgee Valley R. Co., 251 Fed. 161.

Upon this erroneous assumption of fact, the court then sets forth this novel proposition of law:

"It was then the duty of Waterhouse & Co. to notify the bank that the sugar belonged to the Bank; that Waterhouse & Company had no further interest in it and they could dispose of it as they pleased, but instead of that it appears clear to the court that they were willing to take a chance on the

sugar yet. Well, they could not do that and later, when there was a loss on the sugar, repudiate the whole thing and come in and take the other tack." (R. p. 75.)

This evidently means that after the bank had made a blunder which threatened to cause a loss, Waterhouse & Co., upon receiving notice of the blunder, was put to an election either to disavow any further interest in the transaction, forego all chance of the deal going through and allow the bank to work its way out as best it could, or to absolve the bank from all blame and assume the risk of loss which threatened.

We have been unable to find any authority for such a proposition and do not believe it exists.

Assuming that Waterhouse & Co. had notice or knowledge, it would still be incumbent upon the bank to show that it was prejudiced either by an act on the part of Waterhouse & Co. or the International Trading Co., or by a failure to act on their part. There is no evidence of any affirmative act on the part of either of them, so it must be concluded that the court considered that silence or failure to act on their part worked an estoppel.

Nothing is better established by the authorities than that mere silence upon which no action has

been predicated, no liability incurred, and from which no loss has been sustained, does not amount to an estoppel. There must have been some act done or omitted, or change of position made by the person claiming the estoppel. Silence which causes no prejudice does not estop.

See:

Train v. Keefer, 31 Ala. 136.

In re Loll, 162 Fed. 79.

Durham v. Steele, 55 N. W. 509.

Estoppel, 19 Cent. Dig. par. 142.

21 C. J. 1150.

As for that part of the court's statement that after Waterhouse & Co. had acquired notice or knowledge of the mistake made by the bank, it was "*still willing to take a chance*", this is wholly without foundation in the evidence. The evidence does not show that Waterhouse & Co. had any ideas on that subject, one way or the other. But if they had been "*still willing to take a chance*", they would not thereby have prejudiced their right to hold the bank responsible for the blunder. They had a perfect right to wait to see whether or not Sexton & Co., would take advantage of the blunder. If they had not taken advantage of it, there would have been a handsome profit in the deal, and it would be absurd

to say that the bank, after making its blunder, had a right to compel Waterhouse & Co. to either forego a possible profit, or to assume a possible loss. What had Waterhouse & Co. done that they should deserve to be put to such a choice?

Furthermore, the record does not show that either Waterhouse & Co. or the International Trading Co. had possession or control of the sugar at any time, or that they attempted to do anything with it. The record does show, on the contrary, that the bank retained control of the sugar and sold it in the open market and appropriated the proceeds. (R. p. 69.)

II

But, assuming that the bank was entirely blameless in the matter of the loss on the John Sexton & Co. transaction, and further assuming that as against Frank Waterhouse & Co., the bank had a right to set off against such loss the net proceeds of the Montgomery Ward & Co. transaction, by virtue of the guarantee contract on the back of the letter of credit, yet it does not follow that it had such right as against the International Trading Company, and we emphatically dispute such a claim.

We claim that there is no evidence whatever justifying the conclusion that the International Trading Company, at any time, either *expressly or impliedly*, authorized Frank Waterhouse & Co. to pledge its two-thirds interest in the net proceeds of the Mont-

gomery Ward & Co. transaction for any loss that might be incurred in connection with the John Sexton & Co. transaction, and that consequently such pledge, if made by Frank Waterhouse & Co., was null and void, and not binding upon the International Trading Co.

The following facts stand out prominently on the face of the record and are undisputable:

1. That before dealing with Frank Waterhouse & Co., the International Trading Company was entitled to *all* of the net proceeds that might be realized from the Montgomery Ward & Co. transaction.

2. That upon the execution of the contract of May 13, 1920, between the International Trading Company and Frank Waterhouse & Co., the latter became entitled to *one-third* of such net profits, *and no more*; that the right to the other two-thirds was and remained in the International Trading Company.

3. That the bank had at all times full and complete notice and knowledge of the respective rights of these parties in such net proceeds.

4. That in connection with the letters of credit, the bank dealt solely with Waterhouse & Co., and

had no contractual relations with the International Trading Company whatever.

5. That the International Trading Company never *expressly* authorized Frank Waterhouse & Co. to pledge its two-thirds interest in the net proceeds of the Montgomery Ward & Co. transaction for any purpose.

The foregoing propositions being undisputable, it follows that if Frank Waterhouse & Co. had such authority, it must have been *implied*, and an *implied* authority cannot be conceived of under the evidence in this case unless it is sought for in the legal relationship of the parties. The court below recognized this and held that there was a copartnership or agency when it said:

“Whether this arrangement between Nelson (meaning the International Trading Company) and Waterhouse & Co. is treated as a partnership or as a joint adventure or joint enterprise, or whatever you may designate it, I am convinced that Waterhouse & Co. was the fully authorized agent of the International Trading Company to make whatever arrangements were necessary in order to secure finances. This being true, this guaranty that was put on the back of the letter of credit was the final step in securing the money. If it is not looked at as contemplated in the first borrowing, the agency would authorize Waterhouse & Co. to guarantee and

pledge and give a lien on the whole of the proceeds of the transaction to secure the bank in making the arrangement for the money, and I find that everything was pledged by that guaranty on the back of the letter of credit." . . . "Regarding this question of the documents: If Waterhouse & Co. were guarantors and nothing else, there might and would be a more serious question in the case. . . . What makes this governed by another rule is this fact, that is, that Waterhouse & Co. were interested not only in the documents but in the sugar." (See R. p. 74.)

When the court imputed to these parties a partnership relation or the kindred relation of joint adventurers, it evidently overlooked the following significant clause in the contracts between these parties:

"It is distinctly understood that all purchases and sales of the above mentioned sugar were handled solely by you and your associates, and that our only interest in this matter is in the transfer of finances." (See R. pp. 29, 38.)

Frank Waterhouse & Co. evidently feared that it might possibly be considered as sustaining a partnership relation to the International Trading Company, and, therefore, to guard against such an implication, it expressly stipulated in both contracts, that its only interest was in the matter of the transfer of finances, and that it was not to be considered

as interested in the sugar. This clause disposes of the theory that there was a partnership relation between these parties, for there cannot be a partnership relation without consent of the parties interested, in the absence of estoppel or ratification, and there is no question of estoppel or ratification in this case.

“The law does not surprise parties into a partnership against their will in the absence of ratification or estoppel.”

Nat'l Lumber & Box Co. v. Grays Harbor Comm. Co., 71 Wash 31.

“Where no partnership is intended, the mere agreement to assist or serve another and to receive a share of the profits of the business as compensation for services does not constitute a partnership.” 30 Cyc. 362.

See also *Foley v. McKinley*, 131 N. W. 316 (Minn.)

It will also be noticed that the contracts between these parties do not provide for an assignment to Frank Waterhouse & Co. of the sugar contracts which the International Trading Co. had with both Chicago parties. This fact also shows that Waterhouse & Co. did not have, and did not want, an interest in the sugar.

Moreover, nearly all the authorities agree that in order to constitute a partnership there must be (a) a mutual agency, (b) a community of interest or common business, (c) an intent to form a partnership, and (d) an agreement to share profits and losses.

None of these elements are present in the instant case, except an agreement to share profits. It seems that under the earlier English decisions and under a few of the decisions of some American courts, a division of profits might alone constitute a partnership. (See Vol. 22, A. & E. Encyc. of Law, p. 20 and Chap. III of Rowley's Law of Partnership.) But such English decisions have been overruled long ago, and only a few of the American jurisdictions still adhere to them, and even these make an exception to the rule when the share of the net profits is given for certain stipulated services. (See Rowley, *supra*, Sec. 75 *et seq.*) In the State of Washington, the early English decisions have never been followed. (See *Balch v. Big Store Co.*, 46 Wash. 1.)

The above shows that no partnership relation can be inferred from the evidence, and hence no agency can be implied from that relation.

Akin to the theory that there was a partnership relation, is the theory of the court below that Waterhouse & Co. was interested in the sugar. Even if this latter theory were correct, it is not clear what authority such fact would give to Waterhouse & Co. to pledge the interest of the International Trading Company in the sugar or its proceeds, but the court seems to have considered this a very important point for it intimated that if Waterhouse & Co. had not been interested in the sugar, its decision would have been different.

As we have seen that the partnership theory is directly negatived by the second paragraph of the contract between the International Trading Co. and Waterhouse & Co., so is this theory also negatived thereby. But regardless of that paragraph, it is evident from the other parts of the contract as well that Waterhouse & Co. was interested only in the net profits of the sugar and not in the sugar itself.

The court below, in holding that Waterhouse & Co. was interested in the sugar evidently meant to convey the idea that it had "a power coupled with an interest."

Chief Justice Marshall, in *Hunt v. Rousmanier*, 8 Wheat. 204, 5 L. ed. 597, in discussing the meaning

of the expression "a power coupled with an interest", said:

"A power coupled with an interest is a power which accompanies or is connected with an interest. The power and interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be coupled with it."

In *McKillop v. Dewitz*, 140 Pac. 1161, and in *Rucker & Co. v. Glennon*, 107 S. E. 725, this principal is passed on in connection with agencies for the sale of real estate, and in both cases a distinction is likewise made between an interest in the subject of the agency and the proceeds or profits resulting from the exercise of the agency.

It now remains to be seen whether an agency can be otherwise implied. But first, it must be determined what is meant by "agency". There are two senses in which the term is used, the broad and the narrow sense.

In its *broad* sense, the word "agency" indicates the relationship which exists when one person is

employed to act for another. The court below evidently had simply this idea in mind when it held that Frank Waterhouse & Co. was the agent of the International Trading Company, and it must be admitted that Frank Waterhouse & Co. was employed to act for the International Trading Company, and consequently was, in such *broad* sense, an agent. *But every agent in the broad sense of the term does not have authority to bind his principal.*

In the broad sense of the term there are three classes of relations which come within the definition of "agency", viz: (1) The relation of principal and agent as understood in ordinary legal usage; (2) the relation of master and servant; and, (3) the relation of employer or proprietor and independent contractor. (See Mechem on Agency, Sec. 25.)

For obvious reasons, the second relation will be disregarded in this discussion.

It is only when the relation of the first class mentioned exists, that the agent can bind the principal, and it is therefore necessary to determine whether the relationship existing between the International Trading Co. and Frank Waterhouse & Company falls into one class or the other before it can be known whether Frank Waterhouse & Co. had im-

plied authority to bind the International Trading Company in its dealings with the bank.

Mechem on Agency (2nd ed.) defines these classes as follows:

“The relation of principal and agent, or the relation of agency, in the narrower sense is the legal relation which exists where one person, called the agent, is authorized . . . to represent and act for another, called the principal, in the contractual dealings of the latter with third persons. The distinguishing feature of agency may briefly be said to be its representative character and its derivative authority.” Sec. 26.

“The characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate, contractual obligations between his principal and third persons. To the proper performance of his functions therefore, it is absolutely essential that there shall be third persons in contemplation, between whom and the principal legal obligations are to be thus created, modified or otherwise affected, by acts of the agent.” Sec. 36.

“In ordinary legal usage, the agent, . . . is to be . . . distinguished from the “independent contractor” who is one who exercises some independent employment in the course of which he undertakes, supplying his own materials, services and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the

end to be achieved, rather than for the means by which he accomplishes it. Such a person is not an agent in the sense in which the term is used, and has no authority to bind his employer in any form of contractual dealings." Sec. 40.

From these definitions it can be plainly seen that the relationship existing between the International Trading Company and Frank Waterhouse & Co. was not that of principal and agent, proper, but that of employer or proprietor and independent contractor, for (1) there were no contractual dealings between the bank and the International Trading Co. (except as the \$500 loan). Frank Waterhouse & Co. acted only for itself in its dealings with the bank, and was not authorized to and did not create contractual relations between the International Trading Company and the bank, and (2) Frank Waterhouse & Co. exercised an independent employment in the course of which it undertook to perform a certain definite service for the International, to accomplish a certain definite result, supplying its own means of doing so, and not subject to the direction and control of the International Trading Company, but being responsible to it only for the result to be achieved. It insisted upon and obtained complete charge of the matter of obtaining the letters of credit, and the International Trading

Company had nothing to do with it and had nothing to say about it.

It cannot be disputed therefore that Frank Waterhouse & Co. did not come with the narrower definition of agency, as ordinarily understood in legal usage, but was an independent contractor and hence had no power to bind the International Trading Company without express authority.

But even if the fact of agency in its narrower sense had been established, still the bank would have been obliged to show that Waterhouse & Co. had authority to make the pledge in behalf of the International Trading Co. (see Vol. 1, A. & E. Encyc. of Law, pp. 987 and 993), and one of the matters to be shown would be the *necessity* of the act. The court below recognized this when it held that Waterhouse & Co. had authority to make whatever arrangements were *necessary* in order to secure finances.

Was it necessary that Frank Waterhouse & Co. pledge the proceeds of the Montgomery Ward & Co. transaction for the John Sexton & Co. transaction?

The answer is, that the credits had already been issued when the guaranty was executed, and there is no evidence of a previous arrangement for such

pledge; no evidence that the bank asked or stipulated for such pledge; no evidence that the bank would have refused to establish the credits if it had not been assured that such credits would be given. On the contrary, all the evidence indicates that the matter of giving such pledge was never considered by the parties in advance; and that the giving of it was a mere perfunctory matter.

There remains yet to be dealt with the notion that because the Montgomery Ward & Co. deal and the John Sexton & Co. deal both belonged to the International Trading Company and because that company entered into similar contracts with respect to them with Frank Waterhouse & Co., they were, by reason of that fact only, in some way related to, or connected with, each other, so that the proceeds of one could be applied upon any loss that might be occasioned on account of the other, without an express contract to that effect.

That there is no merit in this notion is evident when it is considered that the Montgomery Ward & Co. contract and the John Sexton & Co. contract were wholly unrelated, and that the two contracts between the International Trading Company and Frank Waterhouse & Co., were made and dated at different dates, to-wit: May 13, 1920, and May 22,

1920; that they claimed no relationship with one another; that there is not even a reference in one as to the other; that the contracts themselves are the only competent and the best evidence of the intention of the parties, and that these show no such intention; and that there is no evidence of any kind, competent or incompetent, outside of the contracts, which show or even tend to show that one was dependent upon or connected with the other.

In *Clark v. Neumann*, 76 N. W. 892, a similar notion was advanced under a state of facts which justified it much more than in the instant case. The opinion of the court in that case is so applicable to the instant case that we think a somewhat extended quotation from it is excusable. In that case, there were four separate and complete written agreements made simultaneously. Each of them was for the purchase and sale of one-quarter of a single section of land. The north half of the section was much more valuable than the south half, but the purchase price in each contract was \$5.00 per acre. The purchaser defaulted on his payments on the south half and it was insisted on behalf of the seller that there was but one transaction between the parties, and that the several written agreements were inter-dependent parts of a single indivisible

contract. It was admitted by the defendant that he could not have bought the north half without buying the south half. The court says:

“The difficulty with this position is that the contracts claim no relationship with one another. Whatever may have been the reason for dividing the transaction into four separate and distinct parts, it is entirely certain that such division has been made. Each contract, under the issues in this case, is the exclusive evidence of the rights and obligations of the parties resulting from the sale of 160 acres of land. No one of the contracts contains any reference to the others. . . . The contracts themselves are the only competent evidence of the intention of the parties. Had the company intended to reserve a vendor’s lien on all the land as security for the entire purchase money it is reasonable to suppose the evidence of that purpose would have appeared in the contracts. To charge the north half of the section with the amounts delinquent on the south half, would, doubtless, accomplish substantial justice between the parties; but it could not be done without disregarding their express agreement, and releasing the company from its stipulation to make a deed of conveyance for each quarter section as soon as the consideration therefor should be paid. The fact that the company would not have sold Neumann the north half if he had not purchased the south half at the same time, affords no evidence, competent or incompetent, of an understanding that the unpaid purchase money should be a general lien on the whole tract. The inference is that the com-

pany was satisfied with the security for which it contracted. If the south half was not adequate for the part of the purchase price apportioned thereto, it may be that the personal responsibility of the purchaser was relied on in severing the transaction. But it is needless to speculate in regard to this matter. The parties have made their own engagements and put them in writing. They must now abide by them."

In *Hennerschotz v. Gallagher*, 16 Atl. 518, there were two contracts, of date nine months apart. Each was complete in itself, and neither contained any reference to the other. It was claimed, and it appeared, that the lands mentioned in both contracts were the same. The court says that it was clear as a matter of law that the two agreements were separate and distinct, and that the evidence that was presented to show that they were in fact intended to be one was actually lacking in the essentials of clearness, precision and convincing force necessary to reform a written instrument. But that this need not be discussed, as in the entire absence of any ground laid of fraud, accident or mistake in the making of either agreement, parol evidence was not admissible at all to affect the legal construction.

III

As further and conclusive proof that all parties, the bank, as well as the International Trading Company and Frank Waterhouse & Co., considered and treated the Montgomery Ward & Company transaction and the John Sexton & Co. transaction as separate, distinct and independent deals, and not in any manner connected or joined or dependent upon each other, we call the court's attention to the transaction between the bank and the International Trading Company in connection with the \$500 loan.

This was shortly after the guaranty was signed, when the matter was still fresh, and yet the Montgomery Ward & Co. transaction was then treated as wholly independent and unconnected with the John Sexton & Co. transaction. If the bank had then considered that the one transaction was connected or tied up with the other they would have been so treated, and not having done so, we contend that by taking the order or assignment in question, it is now estopped from claiming not only that the title or right to the interest in the net proceeds of the Montgomery Ward & Co. deal is in the International Trading Company, but is also estopped from claiming that it had a prior lien on such proceeds

for any loss that might be sustained on the John Sexton & Co. transaction.

We claim that this contention is sustained by the following authorities:

“If in making a contract or in the course of dealing the title of one party or the other to the property involved in the transaction is recognized, and the dealing proceeds upon that basis, both parties are ordinarily estopped to deny that title or to assert anything in derogation of it.”

16 Cyc. 802; 21 C. J. 1238; *Ladd v. Tilton*, 49 L. R. A. (N. S.) 657.

“A trustee is estopped to set up in himself any title adverse to those for whom he holds, or to deny their title. Neither can he deny the legality or validity of the trust, or deny that the creator of the trust held the title to the property which the instrument conveys.”

16 Cyc. 952.

“So long as a pledgee of stock holds it as security for a debt, he cannot claim a holding adverse to the pledgor so as to acquire title under the statute of limitations.”

Cross v. Read, 14 Pac. 885.

“The pledgee is estopped to deny the title of the pledgor either by claiming the title to the property in himself or by setting up the title of a third person to the property pledged to him by the pledgor.”

31 Cyc. 807, 808.

The same principle is enforced in a number of other circumstances, as that a tenant cannot dispute his landlords title; the purchaser of land not fully paid for cannot dispute the title of his vendor; a bailee cannot deny the title of his bailor; a depositary can not dispute the title of his depository; a receiptor cannot dispute the title of the officer, a pledgee cannot dispute the title of the pledgor, etc. (See Bigelow on Estoppel, Chapter XVII.)

IV

RECAPITULATION

FIRST: The bank alone was responsible for the loss and alone should stand the loss.

It cannot claim estoppel because no notice or knowledge is shown, nor is shown any act or omission by which the bank was prejudiced.

SECOND: Even if the bank were not to blame for the loss, its right to off-set it against the money belonging to the International Trading Co. would depend upon whether Frank Waterhouse & Co. had authority to pledge it, and this authority is negatived by the fact that the evidence fails to show express authority; because a partnership relation is

negatived by an express written stipulation to that effect between the parties and the absence of elements in the contract essential to the constitution of a partnership; because Waterhouse & Co. had no interest in the sugar but only in the net profits; because the contracts had no connection with each other; because Waterhouse & Co. was not an agent with power to bind the International but was an independent contractor, and further because the pledge was entirely unnecessary.

THIRD: Because all parties concerned in the transaction relating to the \$500 loan treated the two transactions as separate, and the bank, by accepting the order or assignment as collateral security, is estopped from disputing the right and title of the International to it or of claiming that it had a prior lien on it.

Inasmuch therefore, as the bank has admitted that it had in its hands at the time the writ of garnishment was served the sum of \$10,673.26, of which two-thirds unquestionably belongs to the International Trading Company in the absence of the right of the bank to offset anything against it, and it having been demonstrated that it has no such right, it follows that the plaintiff was entitled to

judgment in the court below, and we therefore respectfully submit that the judgment of the court below should be reversed and that court ordered to enter judgment in favor of plaintiff in error.

HADLEY, HAY & HADLEY,
BAUSMAN, OLDHAM, BULLITT & EGGERMAN,
Attorneys for Plaintiff in Error.

9

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 4072

MARTIN ROZEMA, Assignee of the Judgment of
THE HALE COMPANY, a corporation, against
INTERNATIONAL TRADING COMPANY OF
AMERICA, a corporation, *Plaintiff in Error*

vs.

THE NATIONAL CITY BANK OF SEATTLE, a
National Banking Corporation, Garnishee Defend-
ant, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION
HONORABLE EDWARD E. CUSHMAN, JUDGE

**BRIEF OF DEFENDANT
IN ERROR**

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UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION
HONORABLE EDWARD E. CUSHMAN, JUDGE

BRIEF OF DEFENDANT
IN ERROR

STATEMENT

There was no contractual relation, impliedly or otherwise, between the International Trading Company of America, a corporation, and the defendant

in error, The National City Bank. At no time was the bank indebted to the Trading Company, nor did it ever hold any money that was subject to a writ of garnishment on a judgment against that company.

The rights of the parties involved in this action arise out of a letter of credit issued by the defendant in error for the account of Frank Waterhouse & Company of Seattle, Washington; said letter of credit being No. 1128, together with the guaranty of said Frank Waterhouse & Company appearing upon the back of said letter of credit. This letter of credit and guaranty are as follows:

“LETTER OF CREDIT No. 1128
THE NATIONAL CITY BANK
of Seattle.

Seattle, Washington, May 17th, 1920

\$ 65,100.00)

128,100.00) U. S. Currency.

210,000.00)

Kelly & Co., Ltd.,
Hong Kong, China.

“Dear Sir:

“We hereby authorize you to draw on The National City Bank, Seattle, Washington, at 30 days sight for account of Frank Waterhouse & Co., of

Seattle, Wn. for any sum or sums not exceeding in all

Sixty-five thousand one hundred

One hundred twenty-eight thousand one hundred

(1) Two hundred ten thousand . . . DOLLARS
for cost of merchandise to be shipped to Seattle,
Wash., covering 155; 305; 500 tons *standard white granulated* sugar packed in double bags, quality net shipping weight guaranteed by Lloyds and with Hong Kong government certificates of inspection and analysis.

“The drafts negotiated under this credit must be endorsed hereon and bear the clause ‘Drawn under Credit No. 1128 of the National City Bank, Seattle, Washington, dated May 17, 1920’ and advice thereof, in original and duplicate sent to the National City Bank, Seattle, Washington, accompanied with invoice.

Consular certificates and entire set of negotiable bills of lading made out to order of the shipper blank endorsed.

“We hereby engage that drafts in compliance with the terms of this credit will be duly honored if drawn on or before June 1st, 1920.

“Insurance provided by shipper.

“Your obedient servants,

THE NATIONAL CITY BANK,

H. G. HOTCHKISS,

Entered folio

Cashier

H. WITHERSPOON,

Vice-President.”

“GUARANTY”

Seattle.

“To the National City Bank,
Seattle.

“Having received your letter of credit No. -- a copy of which is on the other side hereof I/we do hereby agree to its terms, and in consideration thereof, do bind myself/ourselves to pay to you a sufficient sum in Dollars, United States currency, in this city, to cover any drafts drawn and negotiated in virtue of said credit together with commission at _____ of one per cent.

“I/we hereby give you specific claim and lien on all goods and merchandise and proceeds thereof, for which the negotiators of drafts drawn in virtue of said Credit and/or the (13) National City Bank and/or its correspondents may have paid or for which they may have come under any engagements in virtue of said credit, all policies of insurance on such goods and merchandise to an amount sufficient to cover all advances and engagements under said credit, and all bills of lading given therefor, with full power and authority to take possession and dispose of the same at your discretion, at private or public sale, with or without demand of performance or notice of sale to me/us or to the public, for your security or reimbursement, including commission for sale and guaranty and all expenses; unless on my/our application I/we provide payment in some other way satisfactory to you.

"I/we pledge to you as security for all and any indebtedness or liability existing or that may hereafter arise from me/us to you under said letter of credit, all of said securities, and we further stipulate that all securities which shall be received hereunder may be held, and applied by you to secure any and all indebtedness or liability existing or which may hereafter arise from me/us to you under said letter of credit.

"Marine Insurance on said goods and merchandise shall be effected in ----- with such company or companies and for such amount as you may direct; all policies shall be assigned to you, and loss, if any, shall be made payable to you in currency of the United States of America.

"In the event of the goods or merchandise being shipped by or on board of a vessel carrying the flag of a nation at war, we hereby agree to insure against war risk, and failing so to do, you are authorized to effect such insurance at my/our expense.

FRANK WATERHOUSE & Co.

By R. D. Smalley,
Treas."

(R. pp. 12-15.)

The guaranty was signed by Frank Waterhouse & Company after the last amount had been included in the letter of credit. (R. pp. 68-69.)

Kelley & Company, Ltd., to whom the letter of credit was addressed, shipped in one undivided ship-

ment 585 tons of sugar packed in 5258 bags, which sugar arrived in Seattle July 16th, 1920, shipped to the order of Kelley & Company, Ltd. (R. p. 8.)

The ocean bills of lading, invoices and draft were sent from Hong Kong to the National Bank of Commerce, Seattle, who delivered the bills of lading and invoice, and presented the draft to the defendant in error on June 23rd, 1920. (R. p. 62.) The draft was accepted, payable thirty days later. The sugar was delivered and shipped to purchasers in Chicago under railroad bills of lading; 500 tons going to Montgomery Ward & Company and 85 tons going to John Sexton & Company.

The draft Kelley & Company, Ltd., issued against the letter of credit, No. 1128 issued by the defendant in error covering said sugar, was for \$244,970.46. The duty on the sugar amounted to \$15,441.30, making a total cost of the sugar of \$260,411.77, which the defendant in error paid.

It will be noted that the sugar came in under one shipment packed in 5258 bags for the entire quantity, and one draft. Kelley & Company, Ltd., was not at all concerned in any subsequent distribution of the sugar; nor was there any thought, or suggestion, so far as Kelley & Company, Ltd., was concerned, as to the ultimate destination of

the sugar. It was selling 585 tons of sugar and drawing a draft for the entire purchase price against the letter of credit No. 1128 issued by the defendant in error. The defendant in error, having paid out against the letter of credit the said sum of \$260,411.77, both under the express terms of the letter of credit and under the guaranty accompanying the same, and by virtue of acquiring and holding the documents accompanying the draft, was entitled to and had a specific claim and lien on all the goods and merchandise and proceeds thereof to an amount sufficient to cover all advances and engagements under said letter of credit. The shipment to Montgomery Ward & Company realized the sum of \$233,970.52. This, the defendant in error was entitled to hold against its advances. The sale to Sexton & Company was not consummated; the fall in the price of sugar caused unscrupulous buyers to seek technical means of avoiding their obligations. The defendant in error was, therefore, compelled to dispose of the sugar shipped to John Sexton & Company at Chicago, at the best price obtainable. It realized the total sum of \$17,896.32, out of which it was required to pay freight and demurrage, aggregating \$1382.95. The account therefore stood as follows:

Advances -----	\$260,411.77
Receipts -----	250,483.89
Deficit -----	\$ 9,927.88

That is, the defendant in error has not been reimbursed for the advances it has made against said letter of credit within \$9,927.88. This plain recital of the facts shows clearly why the trial court dismissed the garnishment proceedings, and why the court made findings of fact to the effect that at the time of the service of the writ, or at any time prior to answer, the defendant was not indebted in any amount whatsoever, nor had in its possession any property belonging to the International Trading Company of America.



ARGUMENT

A perusal of the answer of the garnishee defendant discloses its obvious intent and purpose to bring all of the facts in its possession to the attention of the court, and it must be conceded that the answer contained a full, frank and fair statement of all such facts. (R. p. 6 et seq.) The

garnishee defendant might have simply answered "no funds and no effects," and this law suit would not have been commenced. But the answer shows its disposition to be entirely fair with all concerned and to conceal nothing. At the time the eighty-five tons of sugar had not been sold and the garnishee defendant, knowing that if it should be sold for a sufficient price, that there would be money paid to Frank Waterhouse & Company, after the bank had been fully reimbursed, and, being possessed in a general way of the knowledge that International Trading Company had an interest in the contingent fund, it preferred to state the facts in detail. It is apparent that the claim of the plaintiff in error grew out of his construction of the form of the answer of the garnishee defendant and not out of any state of facts. He concluded to interpret the language of the answer to mean that the garnishee defendant owed his judgment debtor, hence the controverting affidavit and this suit.

The plaintiff in error contends:

1. That because the sugar was sold to different parties that they were severable, separate and distinct contracts, and the plaintiff in error is entitled to treat each sale of sugar as a separate and distinct contract and to maintain that if there

was a profit on one sale and a loss on the other that the plaintiff in error should be entitled by the writ of garnishment to hold the profit on the one, although there might be a serious loss on the other. The plaintiff in error by putting the cost of sugar in Hong Kong at so much per ton, calculates that there remained in the hands of the garnishee defendant on the sale of the Montgomery Ward & Company's sugar the sum of \$10,673.26, and calls attention to the answer of the garnishee defendant, but fails to call attention to that portion of the answer of the garnishee defendant reading as follows:

“ and there is still due this garnishee defendant for funds advanced and paid to said Kelley & Co., Ltd., in payment for the quantity of sugar sold to John Sexton & Company, as aforesaid, together with duty charges, interest, commission and disbursements, the sum of Thirty-seven Thousand One Hundred Twenty-four Dollars and Eighty-one cents (\$37,124.81), together with interest thereon at the rate of eight per cent (8%) per annum from July 23, 1920, and also the sum of Five Hundred Dollars (\$500.00) loaned to International Trading Company of America, as aforesaid, together with interest thereon at the rate of eight per cent (8%) per annum from July 15, 1920, until paid, all of which is secured by the excess fund of Ten Thousand Six Hundred Seventy-three Dollars and Twenty-six Cents (\$10,673.26) here-

inabove referred to, the title to the quantity of sugar intended for said John Sexton & Company under the order bills of lading and the guaranty of said Frank Waterhouse & Co., hereinabove referred to." (R. pp. 10 and 11.)

The trouble with this argument is: First, there was but one letter of credit. It is true that that letter of credit was increased, but this increase did not make it other than one letter of credit for the aggregate amount of the sums. This was recognized by the party for whose account it was issued, Frank Waterhouse & Company, who signed it only after the last increase had been incorporated in the letter of credit, and under this letter of credit the defendant in error was entitled to hold not only the documents until its advances were paid, but also by virtue of the guaranty by the party for whose account the letter of credit was issued, Frank Waterhouse & Company, it had a specific claim and lien on all goods and merchandise and proceeds thereof drawn in virtue of said letter of credit as security for all and *any indebtedness* or liability existing, or that may thereafter arise under said letter of credit.

So, even if there were a separate sale, it would be wholly immaterial in this case, but there was but one shipment of sugar, one ocean bill of lading

and one set of documents. Consequently, it would be inequitable and contrary to the express terms of the letter of credit and defendant in error's rights thereunder, and said guaranty, to attempt to segregate the subsequent sales of said shipment of sugar.

Plaintiff in error contends also that the defendant in error must permit it to calculate what profits it made on the Montgomery Ward & Company's sale and to claim that, irrespective of the loss sustained on the John Sexton & Company's sale. There are two answers to this. First: The defendant in error had no contract with the International Trading Company of America, while it was, no doubt, cognizant of the fact that the International Trading Company of America was ultimately interested with Waterhouse & Company in the profits of the deal, it had refused to deal with or to extend to that Trading Company credit and carried on its transactions and issued its letter of credit solely for the account of Frank Waterhouse & Company.

Whatever rights the Trading Company had, or has in the matter arise out of its contractual relations, not with the defendant in error, but with Frank Waterhouse & Company. Under the letters (R. p. 29) to the International Trading Company

from Frank Waterhouse & Company, the said Frank Waterhouse & Company agreed, *after all drafts had been paid*, to render an accounting to the Trading Company, deducting from the gross profits any expenses, and giving to the said Trading Company two-thirds of the remaining balance. If Frank Waterhouse & Company failed and neglected so to do, the International Trading Company has its rights against Frank Waterhouse & Company. The defendant in error declined and refused to extend credit to the International Trading Company because that company had no credit; was not responsible. That it was justified in so doing is demonstrated by the very facts in this case, to-wit; that in July, 1920, a judgment was obtained against the Trading Company for some Fifty-two Hundred dollars. The Trading Company, without any credit and without any responsibility, apparently made some arrangement with Frank Waterhouse & Company whereby it would divide the profits on the sales of sugar on the understanding that Frank Waterhouse & Company would finance the deals. The defendant in error was willing to issue the letter of credit to Frank Waterhouse & Company, a well-known and established concern, and to receive its guaranty, as endorsed upon the

back of the letter of credit. It would not, and did not, deal with the International Trading Company and was under no obligation to it in any of these transactions.

The next reason why the Trading Company is in no position to object to the very just and proper action of the defendant in error in withholding all funds received from the Montgomery Ward & Company's sale until it was reimbursed for its advances, is because Frank Waterhouse & Company, for whose account the letter of credit was issued, and who was the only party having any legal standing or transactions with the defendant in error, examined the documents accompanying the draft, and made no objections to the defendant in error paying the draft. It is true that such examination appears to have been directly after the draft was accepted, but a considerable time before payment. Whether the defendant in error might have protected itself against the payment of the draft is not material to inquire. It is sufficient to say that the party for whom the letter of credit was issued, and whose guaranty was involved in the transaction, made no objection, or protest in any way, shape or manner to the payment of the draft, or to the acceptance of the sugar.

By all rules of law, Frank Waterhouse & Company would be, and was estopped, but the record discloses that Frank Waterhouse & Company never has repudiated its action in accepting and approving the documents.

It is contended in this case that after it became apparent that there might be a loss on the Sexton & Company's shipment that Waterhouse & Company entered into an agreement with the defendant in error that any loss on the whole transaction would be shared equally between the bank and Frank Waterhouse & Company, for whom the letter of credit was issued. In this case there was a loss, as shown by the figures heretofore copied into this brief, of \$9,927.88. Therefore, Frank Waterhouse & Company, after the whole transaction was over, instead of repudiating the acts of the defendant in error in accepting the sugar and the documents, went further, ratified the same by agreeing to stand one-half of that loss, which would still leave the defendant in error a loser in this transaction of one-half of \$9,927.88. The record also discloses that Frank Waterhouse & Company has never claimed that it was entitled to any profit on the Montgomery Ward & Company's sale independent of any other sale of the sugar. There is no claim

or proof, or contention of any fraudulent conspiracy or collusion between the defehdant in error and Frank Waterhouse & Company; nor was there any.

This non-conformity of documents is a pure after-thought; was not even suggested at the commencement of the trial, a straw at which the plaintiff in error grabbed. As the court said in his opinion:

“There was nothing in this case at the time it opened, in your opening statements, to apprise the court of the importance of the question of the conformity of these documents to the letter of credit. Nothing was said in opening this case that it was claimed that any part of this shipment did not measure up to the contract made by the letter of credit.”

The plaintiff in error did not consider it of sufficient importance to mention it in his opening statement. The court of necessity could not in this garnishment proceeding determine whether or not the defendant in error had acted legally in accepting those documents; that is a matter that would have to be adjudicated between the defendant in error and the party for whom the said letter of credit was issued, Frank Waterhouse & Company. It would be impossible to determine that issue in this garnishment proceeding. The question of

damages could not be litigated in this proceeding. The plaintiff in error's position is:

"I claim that the bank by its negligence has damaged Waterhouse; I fix the damages at so much; Waterhouse owes my debtor; Waterhouse and International need not even be heard in the matter; the bank may pay me."

It is elementary also that a writ of garnishment would not issue in an action based on a tort, at least prior to judgment, and as Waterhouse & Company has taken no steps whatever, it would now be barred by the Statutes of Limitation—more than three years having elapsed.

The logic of the plaintiff in error that the defendant in error was negligent in receiving the sugar and accepting the draft in regard to that portion of the sugar shipped to Sexton & Company destroys itself. Conceding that the sugar shipped, as stated in the documents, was "granulated white sugar, Java No. 24" and that the letter of credit of the defendant in error called for "standard white granulated sugar," the letter of credit issued to the account of Montgomery Ward & Company by the First National Bank of Chicago (R. p. 32), called for "standard white sugar" and the letter of credit issued by the Corn Exchange National

Bank of Chicago for the account of John Sexton & Company called for "standard white granulated sugar," then the defendant in error was equally negligent in accepting the sugar that was shipped to Montgomery Ward & Company. If it was negligent in the one instance, it was equally negligent in the other. The plaintiff in error is in no position to seek to take advantage of the shipment to Montgomery Ward & Company and in the same breath repudiate the shipment to Sexton & Company. It cannot "blow hot and cold." It cannot ratify the good and repudiate the bad. If it repudiates one, it must repudiate the other. All this goes to show that the defendant in error, bank, was acting in good faith in accordance with the wishes and satisfaction of Waterhouse & Company and, as the court below said in his opinion:

"Regarding this question of the documents: If Waterhouse & Company were guarantors and nothing else, there might be and would be a more serious question in the case. Of course the suit between the National City Bank and the Seattle National Bank is another story. What makes this governed by another rule is this fact, that is, that Waterhouse & Company were interested not only in the documents but they were interested in the sugar; and although the National City Bank had accepted the Kelley draft, yet I am convinced from the evidence in this case that Waterhouse & Company,

when the documents were presented—and the court must conclude that they had notice that they did not exactly conform—assuming that they did not conform, that it was then the duty of Waterhouse & Company, representing its own interest and that of the partnership or the other company associated with it in the enterprise—it was then the duty of Waterhouse & Company to notify the bank that the sugar belonged to the bank, that Waterhouse & Company had no further interest in it and they could dispose of it as they pleased, but instead of that it appears clear to the court that they were willing to take a chance on the sugar yet. Well, they could not do that and later, when there was a loss on the sugar, repudiate the whole thing and come in and take the other tack.” (R. pp. 74-75.)

That is, Waterhouse & Company with whom the defendant in error was dealing, could not if it had desired, and it is clear that it did not desire, repudiate the act of the defendant in error in accepting the sugar, as the court said it was willing to take a chance on the sugar, and they could not do that, and then where there was a loss, come in and take the other tack.

That plaintiff in error himself lost the thread of this argument is indicated by the fact that twice on page 3 of his brief and again on page 13 he states that the Montgomery Ward & Company letter of credit called for “white granulated sugar”

and on this statement he bases much of his argument. This letter of credit is plaintiff's exhibit No. 2 shown on page 32 of the record. It does not call for "white granulated sugar" but for "standard white sugar." Notwithstanding the effort of the plaintiff to attach great importance to the omission of the word "standard" from the Montgomery Ward & Company letter of credit, his error of statement is so manifest that there could have been no intent to mislead as he immediately refers to the exhibit and the record which show that the word "standard" was *not* omitted from the Montgomery Ward & Company letter of credit.

And, as to the relation of Frank Waterhouse & Company to the International Trading Company, the court in its opinion said:

"Whether this arrangement between Nelson and Waterhouse & Company is treated as a partnership or a joint adventure or joint enterprise, or whatever you may designate it, I am convinced that Waterhouse & Company was the fully authorized agent of the International Trading Company to make whatever arrangements were necessary with the bank in order to secure finances. That being true, this guaranty that was put on the back of the letter of credit, was the final step in securing the money. If it is not looked at as contemplated in the first borrowing, the agency would authorize

Waterhouse & Company to guarantee and pledge and give a lien on the whole proceeds of the transaction to secure the bank in making the arrangement for the money, and I find that everything was pledged by that guaranty on the back of the letter of credit."

Manifestly, whatever relations existed between Waterhouse & Company and the International Trading Company, the situation was such that whatever Waterhouse & Company did was binding and controlling on the International Trading Company.

It is contended that somehow or other, the bank by loaning \$500.00 to the International Trading Company and accepting as collateral to said note an order on Frank Waterhouse & Company to pay said note out of the Montgomery Ward & Company's sale, has changed the legal situation of the parties. No stretch of the imagination can accomplish that fact in regard to that matter. The bank lent the International Trading Company \$500.00; took its note for it. The International Trading Company gave an order on Waterhouse & Company, directing Waterhouse & Company to pay out of its profits that it would get out of the Montgomery Ward & Company's sale, said note.

Certainly, that did not affect the situation of the parties and, as the court said in its opinion:

“It has been argued that afterwards, in borrowing the \$500.00, there was a recognition that these were separate deals and separate transactions to be kept separate in every way. That does not follow. If the International and Nelson wanted to pledge a part of what was to be realized out of one of these deals with his customer, for his own convenience, that could be done, without showing any intention to recognize the guaranty on the back of the letter of credit in any other way than pledging everything.”

A plaintiff in garnishment can get no better right to the debt garnisheed than his debtor has.

Bellingham Bay Boom Co., v. Brisbois, 14 Wash. 173.

Barkley v. Kerfoot, 77 Wash. 556.

Puget Sound Machinery Depot v. Pearson, 99 Wash. 364.

Fidelity Trust Co. v. New York Finance Co., 125. Fed. 275.

Allen v. Aetna Life Insurance Co., 145 Fed. 881.

North Chicago, etc. v. St. Louis, etc. 152 U. S. 596.

In Brisbois' case the court said:

“But if the debt sought to be garnisheed is not at the same time in fact due and owing from the

garnishee to the judgment debtor, it necessarily follows that there is nothing upon which the writ can operate. The garnisher can get no better right to the debt garnisheed than his debtor has, and if the latter has no right in or to the debt, the former acquires none by his garnishment."

As the defendant in error was not indebted to the Trading Company, the debtor of the plaintiff in error, at the time the writ was served and the answer of the garnishee defendant submitted, the plaintiff in error's action must fall.

We respectfully submit that there was but one decision that could have been made by the trial judge, and that was the one he made, dismissing the garnishment proceedings; otherwise, a very gross injustice would have been inflicted upon the defendant in error by a party with whom it had no dealings and was under no legal obligation.

Respectfully submitted,

ALMON RAY SMITH,

POE, FALKNOR & FALKNOR,

Attorneys for Defendant in Error.

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 4072

MARTIN ROZEMA, Assignee of the Judgment of
THE HALE COMPANY, a corporation, against
INTERNATIONAL TRADING COMPANY OF
AMERICA, a corporation, *Plaintiff in Error*

vs.

THE NATIONAL CITY BANK OF SEATTLE,
a National Banking Corporation, Garnishee Defend-
ant, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF PLAINTIFF
IN ERROR

HADLEY, HAY & HADLEY
BAUSMAN, OLDHAM, BULLITT & EGGERMAN
Attorneys for Plaintiff in Error

In the
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REPLY BRIEF OF PLAINTIFF
IN ERROR

It will be noted that the only objection raised by
defendant in error to our statement of the facts is
an *immaterial one*. Inadvertently we referred to

the Montgomery Ward & Co. letter of credit as calling for white granulated sugar. It called for Standard white sugar. This is an immaterial matter and does not in any way affect the facts in the case, as the Montgomery Ward sugar was accepted and paid for.

We call attention to the fact that the bank does not deny the following material assertions:

First: That it was responsible for the loss that arose on the Sexton deal.

Second: That it at all times had knowledge of the interest of the International Trading Company in the transaction.

Third: That in establishing the letter of credit in the Orient, the bank dealt solely with Waterhouse & Company, and had no contractual relations with the International Company in that respect.

This last mentioned fact being admitted, there is no foundation left for the theory of the court below that a partnership or joint adventure relation, or relation of principal and agent, existed between the International and Waterhouse & Company, for if such relation *had* existed, the bank would have had contractual relations with the International through the Waterhouse Company.

But from the fact that there was no such contractual relation defendant in error draws the conclusion that there were no legal relations between the bank and the International Trading Company by virtue of which the International had a right of action against the bank.

In coming to this conclusion defendant in error evidently overlooked the effect of the order given by the International to the bank which was approved by Waterhouse & Company, and the well-established principle that where two parties make an agreement for the benefit of a third party, such third party can sue upon such agreement. In this case, Waterhouse & Company and the bank made an agreement for the *express and sole benefit* of the International Trading Company, and by means of such agreement a sum of money amounting to two-thirds of \$10,673.26 belonging to the International Trading Company came into the hands of the bank which it appropriated to its own use and denies that the International Trading Company has any interest in it.

The authorities are clear that under these circumstances the International Trading Company has a right of action against the bank.

“It is now the settled doctrine of so many of the states, that it may be called the American doctrine

Rea v. Barber, 135 Fed. 890.

Central Trust Co. v. Berwind, etc., 95 Fed. 391.

Gibson v. Victor Talking Machine Co., 232 Fed. 225.

Gooch v. Buford, 262 Fed. 894.

Austin v. Seligman, 18 Fed. 519.

Penn. Steel Co. v. N. Y. City Ry. Co., 198 Fed. 721, 749.

Constable v. Natl. Steamship Co., 154 U. S. 74.

German Alliance Co. v. Home Water Co., 226 U. S. 231.

In the case at bar, not only was the International *intended to be benefited*, but the contract was made *for its benefit as its object*, and it was the *sole beneficiary*. Furthermore, assets came to the hands of the bank which in equity belonged to the International.

The above authorities show that the International Trading Company had a right of action against the bank, under both the Washington and the Federal decisions, even if the order given by the International and approved by Waterhouse & Company had never been given to the bank. How

much stronger then is the right of the International when that order is also taken into consideration, for by that order Waterhouse & Company relinquished all possible claims it might have made to the two-thirds of the net profits of the Montgomery Ward & Company deal, and the record shows that the amount of these net profits have been definitely ascertained. (See Record, pp. 10 and 70.)

The Washington Supreme Court in *Moore v. Baasch*, *supra*, has also held as follows:

“The rule is, that the parties to an agreement made for the benefit of a third party, if accepted by that party, cannot themselves annul the contract by mutual releases.”

We wish to call the court's attention to one more point in the brief of defendant in error. On page 17 of such brief it is asserted that “the plaintiff in error's position is:

“I claim that the bank by its negligence has damaged Waterhouse; I fix the damages at so much; Waterhouse owes my debtor; Waterhouse and the International need not even be heard in the matter; the bank may pay me.”

That is not our position. We do not claim that the bank damaged Waterhouse. On the contrary, we claim that the bank damaged itself, and cannot

look to anyone else to make good that loss, and especially not to the International.

Respectfully submitted,

HADLEY, HAY & HADLEY,

BAUSMAN, OLDNHAM, BULLITT & EGGERMAN,

Attorneys for Plaintiff in Error.

In the
**United States Circuit Court
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No. 4072

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UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION
HONORABLE EDWARD E. CUSHMAN, JUDGE

Petition for Rehearing

HADLEY, HAY & HADLEY
BAUSMAN, OLDHAM, BULLITT & EGGERMAN
Attorneys for Plaintiff in Error

The court has decided that plaintiff in error is not entitled to recover for two reasons:

First,—“Because the defendant in error could not accept the draft in part and dishonor it in part.”

Second,—“If the defendant in error should have refused to accept or pay the draft on account of the John Sexton & Co. purchase, it should for the like reason, have refused to accept or pay the draft on account of the Montgomery Ward & Co. purchase, because, as already stated, the sugar did not satisfy or comply with the requirements of either contract as to quality; and had the defendant in error stood upon the strict letter of its contract it would have refused to accept or pay the draft in its entirety, and in that event there would have been no sales and no profits.”

In the second reason, the court assumes the fact to be that payment on the Montgomery Ward & Co. letter of credit could have been refused for the same reason that payment on the Sexton & Co. letter was refused. In other words, that the sugar shipped by Kelley & Co. did not satisfy the requirements of either the Montgomery Ward & Co. letter of credit or the John Sexton & Co. letter of credit.

In this the court is in error. The Montgomery Ward & Co. letter of credit did not require any certificate as to quality or weight to accompany the

draft (see record, p. 32), while the John Sexton & Co. letter of credit expressly required such certificates. (See record, p. 53.) Hence, while the bank issuing the Sexton & Co. letter of credit was justified in refusing payment because of the fact that the description of the sugar in the Hongkong government certificate did not conform to the description in its letter of credit, the bank which issued the Montgomery Ward & Co. letter of credit was not justified in doing so.

If the sugar delivered to Montgomery Ward & Co. had not come up to the requirements of its *contract* with the International Trading Company, the only recourse Montgomery Ward & Co. would have had would be a suit for breach of contract against the International Trading Company. The bank issuing their letter of credit could not refuse to honor a draft drawn under it accompanied by a bill of lading and abstract of invoice, and hence it did not refuse payment, but promptly honored the draft.

We admit that "the defendant in error could not accept the draft in part, and dishonor it in part," and that "had the defendant in error stood upon the strict letter of its contract, it would have refused to accept or pay the draft in its entirety, and

in that event there would have been no sales and no profits." The defendant in error had a perfect right to refuse the draft as presented, and *had it done so, and notified Waterhouse & Co. or the International Trading Company, and returned or offered to return the letter of credit which had been assigned to it*, it would have been absolved from all responsibility.

If it had done so, that is, if it had done all of the three things above mentioned, Waterhouse & Co. and the International or the Interational alone, could have pursued either one of the following three courses:

First—They could have cabled Kelley & Co. their refusal to take so much of the sugar as was destined for Sexton & Co. and offered to take the balance and have the draft honored to the extent of the cost of such balance. Such offer would undoubtedly have been accepted, and the International and Waterhouse & Co. would have been sure of the profits on the Montgomery Ward & Co. deal.

Second—They could have obtained a correction of the certificate and held the sugar in Seattle until the arrival of the corrected certificate. There was still plenty of time for this as the draft was presented on June 23d, and the Ward & Co. letter did

not expire until Aug. 1st, and the Sexton & Co. letter not until August 20th. (See record, pp. 32 and 52.) If this had been done, profits might have been realized on both transactions.

Third—They could have refused to take any of the sugar and could have bought it elsewhere to fill both of the contracts. There was plenty of time to do this as is above indicated. If that course had been pursued, profits on both transactions might have been realized.

The bank did not choose to follow the course which would have freed it from all responsibility, and given Waterhouse & Co. and the International an opportunity to protect their interests, but it accepted the draft, said nothing to Waterhouse or the International, and retained the letters of credit. By adopting this course, it adopted all risks incident to it. It could have thrown all the risk upon the other parties, but it chose not to do so. By failing to avail itself of its undoubted right to refuse the draft, and by depriving the other parties of any of the alternatives above mentioned, the bank lost its right to throw all the responsibility upon the other parties, or any part of such responsibility. The bank took the risk and all the risk. It should therefore be obliged to abide by the result of it,

and not be allowed to shoulder the loss, or any part of it, upon any one else.

If, *after* the draft had been accepted, the bank had notified Waterhouse & Co. or the International of what had been done and the actual situation resulting therefrom, these parties together, or the International alone, could have adopted one of two courses:

First—They could have refused to take any part of the sugar and required the bank to return the letters of credit which had been assigned to it. The sugar necessary to fill both orders could then have been procured elsewhere, and they might have realized profits on both transactions. If this course had been adopted, the bank would have had the entire shipment on its hands instead of only the smallest part of it, and its losses would have been six or seven times larger.

Second—They could have agreed to accept so much of the sugar as was required to fill the Montgomery Ward & Co. order, leaving the balance in the bank's hands. By adopting this course they could have saved themselves the profits on the Montgomery Ward & Co. deal, and also save the bank from the tremendous loss which it would have

incurred if the first alternative course had been adopted.

The bank, however, gave the International and Waterhouse & Co. no opportunity to choose between these two courses of action, and now after the transaction is closed, when the only alternative left for the International and Waterhouse & Co. is to take the profits on the Montgomery Ward & Co. deal, the bank now claims, in effect, that the transaction should be treated as if the International and Waterhouse & Co. had not only repudiated the whole transaction, but had also relinquished their rights to the letters of credit to the bank, and the court, by its decision, has sustained them in that contention.

We submit that such a result is not justifiable.

But the court says:

“In view of the situation here disclosed, the trading company could not ratify what was done in part, and disaffirm in part; it could not claim the benefits under one contract and repudiate the burdens under the other.”

We submit that this holding is erroneous for three reasons:

First—Assuming that the relationship between Waterhouse & Co. and the bank was that of prin-

cial and agent, such holding is wrong because the acceptance of part of an agent's acts in which he follows directions is no ratification of other separable parts in which he was disobedient to his principal's orders, or negligent in the performance of his duties. See *Corpus Juris*, Vol. 2, 484, citing *Coursier v. Ritter*, 6 Fed. Cas. No. 3282; *Knowlton v. Logansport School City*, 75 Ind. 103; *Bank of Owensboro v. Western Bank*, 26 Am. Rep. 211.

Even though the bank had improvidently combined the two transactions into one, the separation of the part of the sugar necessary to fill the Montgomery Ward & Co. order was perfectly feasible and was actually accomplished, and consented to by the bank, and the bank is in no position to complain because, by accepting that part of the sugar, the loss of the bank was cut down to a small part of what it would have been if the sugar to fill the Montgomery Ward & Co. contract had not been accepted and the letters of credit had been given up.

Second—The court's holding is wrong, because the legal relationship existing between Waterhouse & Co. and the bank was not that of principal and agent, and therefore the question of ratification does not come into play here.

We have shown at length in our opening brief (pp. 33 to 36) that the legal relationship between the International and Waterhouse & Co. was not that of principal and agent, but that of employer and independent contractor. Our contentions upon that point were not combatted by our opponent, and the court has not expressly held us wrong in that contention. We now contend that the reasoning and the authorities applicable to the relationship between the International and Waterhouse & Co. are also applicable to the relationship existing between Waterhouse & Co. and the bank. We claim the relationship was not that of principal and agent, but that of employer and independent contractor. To the authorities cited in our opening brief, we will add the following from Anson on Contracts, p. 408 (Huffcutts ed.):

“ ‘Agency’ is not co-extensive with ‘employment’ though it is, unfortunately, not uncommon to speak of a person employed for any purpose as the agent of the employer. By agency I mean employment *for the purpose of bringing the employer into legal relations with a third party.*”

The bank was carrying on an independent business, in the course of which it undertook to issue a letter of credit in a transaction in which the Inter-

national Trading Company and Kelley & Company were interested, and later in another and different one between the same parties.

The bank was left at liberty to choose its own means and methods, and was responsible only to its employer for results which it undertook to bring about. It was not under the control of Waterhouse & Co. in any particular whatever. It was not to establish any legal relationship between Waterhouse & Co. or the International and Kelley & Co. or any third party. It was not to act in a representative capacity, but for itself alone. By issuing the letters of credit it was to bind itself to Kelley & Co., but not to bind Waterhouse & Co., or the International to Kelley & Co. The cablegrams which the bank sent to Kelley & Co., or rather to the International Banking Corporation of Hong-kong, China, constituted complete and independent contracts between itself and Kelley & Co., when the latter acted upon them. See the following cases, hereinafter cited more at length:

American Steel Co. v. Irving National Bank,
226 Fed. 41.

Frey & Son v. Sherburne Co., 184 N. Y. S.
661.

Lafargue v. Harrison, 70 Cal. 380.

Such being the facts, the relation of principal and agent did not exist, and therefore the rule that a principal cannot take the benefit of a contract of his agent without taking its burdens has no place in this discussion.

In *Ellison v. Jackson Water Power Co.*, 12 Cal. 542, 552, Field J., says:

“These terms (‘adoption’ and ‘ratification’) are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however, unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent.”

“The ratification of a contract necessarily implies the relation of principal and agent; and unless that relation existed, the idea of ratification is necessarily excluded.”

Pittsburgh v. Gazzam, 32 Pa. St. 340, 347.

Third—In holding that the International and Waterhouse & Co. could not ratify in part and disaffirm in part, the court was evidently proceeding upon the theory that in accepting the draft in question, the bank was by that action also accepting performance of the contract between the International and Kelley & Co., and that it was accepting

the sugar itself; that it was up to Waterhouse & Co. and the International to either accept the bank's action as a whole or to reject it as a whole; that it could not accept part of such action and reject the other.

We submit that the bank's action in accepting the draft had no effect whatever as far as the matter of accepting performance of the contract between the International and Kelley & Co. was concerned. In this case, as in the case of every other letter of credit, there were two separate and independent contracts, one between the International and Kelley & Co. and the other between the bank and Kelley & Co. In the contract between the bank and Kelley & Co., the bank was only concerned with the question whether or not the draft and the documents accompanying it complied with the terms of the letter of credit or rather with the cablegrams. If they did, it was justified in honoring the draft. If they did not, it was not justified. If the draft and documents were correct, it mattered not whether the statements contained in them were true or false, or whether the documents were forged or spurious. (See *Woods v. Thiedeman*, 1 Hurlstone & Coltman, 478; *Ulster Bank v. Synnot*, 5 Irish C. Q. R. 595; *Guaranty Trust Co. of N. Y. v. Hannay & Co.*,

(1918), 87 L. J. (K. B.) 1223; *Bass v. Bank of Australasia* (1904), 90 L. T. 618.)

Neither did it matter to the bank whether Kelley & Co. had violated its contract with the International or not. That was none of its business. Even if the sugar had been brown sugar instead of white, and even if the bank had been fully aware of that fact at the time the draft was presented, yet it could not escape accepting the draft if the documents accompanying had been in proper shape. (See *Beneke v. Haebler*, (1899), 58 N. Y. S. 16, affirmed by Court of Appeals, 60 N. E. 1107.)

In *American Steel Co. v. Irving Natl. Bank*, 266 Fed. 41, the court says:

“There is but one vital question involved in this case: It is whether the letter of credit already set forth herein is a complete and independent contract between the plaintiff and the defendant. This court is satisfied that it is.”

The court also says:

“The law is that a bank issuing a letter of credit, like the one here involved, cannot justify its refusal to honor its obligation by reason of the contract-relations existing between the bank and its depositor.”

document called for goods which the buyer was bound to accept. The banker knows only the letter of credit, which is his only authority to act, and the documents which are presented under it. If these documents conform to the terms of the letter of credit, he is bound to pay. If not, he is equally bound not to pay."

These authorities show that the bank was not interested in the performance of the contract between the buyer and seller, and was not obliged to look after the interests of the buyer, but, on the other hand, the International, as buyer of the sugar, was directly interested in seeing to it that the contract with the seller had been fully executed on the seller's part. Part of this contract was that the documents accompanying the draft and bill of lading should specify the sugar to be "Standard White Granulated Sugar." The documents did not so specify, and therefore the International would have been justified in rejecting the whole shipment and holding Kelley & Co. for damages, but in spite of the want of proper documents, it was able to take the greater part of the shipment, and, the contract being severable, it took so much of it as was necessary to fill the Montgomery Ward & Co. contract and rejected the balance. By this action it minimized its claim for damages as much as possi-

ble, and relieved the bank from the greater part of the consequences of its blunders.

II

As to the other branch of the case in which we contended that the Montgomery Ward & Co. transaction and the Sexton & Co. transaction were separate and distinct; that separate and distinct letters of credit should have been issued; that there should have been separate and distinct drafts, and that defendant in error should have accepted and paid the one, and should have refused to accept or pay the other, the court says:

“Whatever else may be said of the relationship between the parties, Waterhouse & Co. was necessarily invested with implied authority to do whatever was necessary and proper to obtain letters of credit in the usual and customary way.”

We do not dispute this proposition, for that would follow whether Waterhouse & Co. were considered as an independent contractor as well as if it were considered as an agent. But we deny that Waterhouse & Co. had any authority to do anything or to consent to anything, to authorize or ratify anything that was *unnecessary, improper*, and not *usual or customary*. We claim that the bank in combining

the two transactions did something that was *not necessary*, was *not proper*, and was *not usual* or *customary*.

(a) It was *not necessary* to combine the two transactions. The first cablegram answered the purpose as far as procuring the sugar destined for Montgomery Ward & Co. was concerned, and a second cable of a similar import would have answered as far as the sugar destined for Sexton & Co. was concerned.

(b) It was *not proper* to combine the two transactions into one, because, as we have seen, the conditions in the Montgomery Ward & Co. letter of credit were different from those in the Sexton & Co. letter of credit, and the bank should have foreseen that the combination of the two transactions might lead to the embarrassing complications which actually did result. If the two transactions had been kept separate by the bank, it could have, with safety, accepted a draft drawn upon it for the sugar to fill the Montgomery Ward & Co. contract, and it could have properly refused a draft drawn for the Sexton sugar. By combining the two transactions into one, it placed itself in a position where it had either to accept both or refuse both. It was therefore highly improper for the bank to combine the

two into one, in fact, it was its initial blunder, and the cause of all its subsequent troubles.

(c) That it was *not usual or customary* to so combine dissimilar transactions is self-evident. It is not *usual or customary* for banks to perpetrate such blunders. If it were, they would soon get out of the habit. Besides, there was no evidence whatever to the effect that it is, usual and customary to so combine dissimilar transactions.

There is no evidence whatever that Waterhouse & Co. was aware that the bank had combined the two transactions into one by its cablegrams. It did, indeed, sign a writing purporting to be a letter of credit and guaranty in which both transactions were combined, but such letter was never sent, and this document served only to fix the responsibility of Waterhouse & Co. to the bank. This writing was signed after the cablegrams had been sent, so it could not be evidence of authorization, and it could not be evidence of ratification unless it was shown by the evidence that Waterhouse & Co. had knowledge of the combination, and such evidence is wholly lacking.

But even if Waterhouse & Co. might be held to have either authorized or ratified the combination, it could not bind the International by such action,

for, in the first place, it was not the agent of the International, and hence could not bind it. (See our opening brief, pp. 33 to 36.) In the second place, even if Waterhouse & Co. should be considered the agent of the International, there would be no implied authority to authorize or ratify an act which was manifestly *unnecessary, improper, and not usual or customary*.

The court further says:

“Nor did it (Waterhouse & Co.) exceed its authority in executing the guaranty. The defendant in error had refused to issue the letters of credit for the Trading Company with the bills of lading as sole security, and the parties necessarily understood that there must be further security on the part of Waterhouse & Co. The guaranty and lien were suitable security to the end in view, and were, therefore, within the contemplation of the parties.”

We do not dispute this proposition if it is limited to holding that it was proper for Waterhouse & Co. to sign this guaranty. On the contrary, so limited, we admit that it was eminently proper. It was necessary for the bank to have written evidence of Waterhouse & Co.'s responsibility, and there is no doubt but what Waterhouse & Co. could sign anything it pleased, and could pledge its own interest in the transaction to any extent it desired, but we

deny that it had authority to bind the International Trading Company by this guaranty, because, considered as an independent contractor, it had no authority to bind the International whatever, and, considered as an agent, it had no authority to bind it unnecessarily. (See our opening brief, pp. 33 to 38.)

In conclusion, we submit that the bank was negligent, first, in combining the two transactions into one; second, in accepting the draft, and, third, in failing to give notice of the situation. Further, that the International Trading Company never authorized, ratified or condoned such acts of negligence, directly or indirectly.

It follows that the bank, and the bank alone, should stand the loss occasioned by such negligence, and should not be allowed to shoulder any of it on to the International.

We therefore respectfully submit that a re-hearing should be granted.

HADLEY, HAY & HADLEY,

BAUSMAN, OLDHAM, BULLITT & EGGERMAN,

Attorneys for Plaintiff in Error.

We, the undersigned, of counsel for the plaintiff in error herein, do hereby certify that in our opinion, and in the opinion of each of us, the foregoing petition for re-hearing is well founded and that the same is made in good faith and not merely for the purpose of delay.

EDGAR S. HADLEY.
ROBERT P. OLDHAM,

United States
Circuit Court of Appeals

For the Ninth Circuit.

PUGET SOUND MACHINERY DEPOT, a Corporation,

Plaintiff in Error,

vs.

JAMES C. DAVIS, Director General of Railroads
of the United States, and Agent of the
United States, Under the Transportation
Act, 1920, Providing for the Termination of
Federal Control of Railroads,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

MESSRS. BRONSON, ROBINSON & JONES,
Attorneys for Plaintiff in Error,
614 Colman Building, Seattle, Washington.

GEORGE T. REID, Esq.,
Attorney for Defendant in Error,
909 L. C. Smith Building, Seattle, Wash-
ington.

C. H. WINDERS, Esq.,
Attorney for Defendant in Error,
909 L. C. Smith Building, Seattle, Wash-
ington. [1*]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 5976.

JAMES C. DAVIS, Director-General of Railroads
of the United States, and Agent of the United
States under the Transportation Act, 1920,
providing for the Termination of Federal
Control of Railroads,

Plaintiff,

vs.

PUGET SOUND MACHINERY DEPOT, a Cor-
poration,

Defendant.

*Page-number appearing at foot of page of original certified Trans-
cript of Record.

Complaint.

Comes now the plaintiff and for cause of action against the defendant alleges:

I.

That the plaintiff herein is now the duly appointed, qualified, and acting Director-General of Railroads of the United States, and agent of the United States for the purpose of terminating federal control of railroads, as provided by the Transportation Act, 1920, being an act of Congress of the United States providing for the termination of federal control of railroads, and that this action is brought by the plaintiff pursuant to the terms of the act of Congress above referred to and in connection with the operation by the United States, by and through its railroad administration, of the railroad system of the Northern Pacific Railroad under acts of Congress of the United States known as the federal control acts and proclamations of the President issued pursuant thereto; and that the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, maintaining offices and doing business within Seattle, King County, Washington, within [2] the Western District of Washington.

II.

That on the 3d day of March, 1919, there was delivered to a connecting carrier as operated by the then Director-General of Railroads, at Camden, New Jersey, by the Camden Forge Co., one car, to

wit, P. R. R. 294966, loaded with 80 flanged shaftings, for transportation from Camden, New Jersey, to the defendant at Seattle, Washington, and which car was thereafter duly transported and delivered by the predecessor in office of this plaintiff, as operating the Northern Pacific Railroad, to the defendant on, to wit, the 8th day of April, 1919, and that there accrued thereon, in accordance with the duly published tariffs duly filed with the Interstate Commerce Commission of the United States, as provided by law, said shipment moving in interstate commerce, charges in the sum of Two Thousand and Twenty-eight and 35/100 Dollars (\$2,028.35), plus war tax in the sum of Twenty-five and 60/100 Dollars (\$25.60), on account of which there was paid by the defendant the sum of One Thousand, One Hundred and Seventy-five and 15/100 Dollars (\$1,175.15) leaving a balance owing of Eight Hundred and Seventy-eight and 80/100 Dollars (\$878.80).

That thereafter and on the 10th day of March, 1919, there was delivered at Camden, New Jersey, by the same consignor, a second car loaded with 21 uniform forgings flanged shaftings, loaded in car P. R. R. 294476, for transportation from Camden, New Jersey, to the defendant at Seattle, Washington, and that said shipment was by the predecessor in office of this plaintiff, the then Director-General of Railroads, operating the Northern Pacific Railroad, delivered to the defendant at Seattle on, to wit, the 5th day of April, 1919; that under the tariffs duly filed with the Interstate Commerce

Commission [3] as aforesaid, there accrued thereon freight charges in the sum of Two Thousand, Four Hundred and Twenty-two and 50/100 Dollars (\$2,422.50), plus war tax in the sum of Thirty and 60/100 Dollars (\$30.60), and that there was paid on account thereof to the predecessor in office of this plaintiff the sum of One Thousand, Four Hundred and Two and 50/100 Dollars (\$1,402.50), leaving a balance due and owing of One Thousand and Fifty and 60/100 (\$1,050.60).

That thereafter and on the 22d day of March, 1919, a third car was consigned from Camden, New Jersey, to the defendant at Seattle, Washington, being car N. Y. C. 347714, purporting to be loaded with 51 flanged shaftings, and that said shipment was thereafter transported from Camden, New Jersey, to Seattle, Washington, and delivered by the predecessor in office of this plaintiff as operating the Northern Pacific Railroad, to the defendant at Seattle on the 25th day of April, 1919; that there accrued on account of transportation charges thereon, under the tariffs duly filed with the Interstate Commerce Commission as aforesaid, the same being transported in interstate commerce by the predecessor in office of this plaintiff and connecting carriers, the full sum of Two Thousand, Eight Hundred and Four and 88/100 Dollars (\$2,804.88) with war tax in the sum of Thirty-five and 43/100 Dollars (\$35.43), on account of which there was paid by the defendant to the predecessor in office of this plaintiff the sum of One Thousand, Six Hundred and Twenty-three and 88/100 Dol-

lars (\$1,623.88), leaving a balance due and owing in accordance with the duly published tariff charges governing the transportation of said car of One Thousand, Two Hundred and Sixteen and 43/100 Dollars (\$1,216.43).

That thereafter and on the 9th day of April, 1919, there [4] was delivered to the Director-General of Railroads at Camden, New Jersey, a fourth car, purporting to contain 31 flanged shaftings and 11 forgings, the same being loaded in B. & A. car 10229, for transportation from Camden, New Jersey, to the defendant at Seattle, Washington, and which car was thereafter transported from Camden, New Jersey, to Seattle, Washington, and delivered by the predecessor in office of this plaintiff, Director-General of Railroads, as operating the Northern Pacific Railroad, to the defendant on, to wit, the 12th day of May, 1919, and that there accrued thereon, in accordance with the lawfully published tariffs and classifications under which said shipment moved and as duly filed with the Interstate Commerce Commission as provided by statute, said shipment moving in interstate commerce, charges in the sum of One Thousand, Eight Hundred and Ninety-four and 30/100 Dollars (\$1,894.30) with war tax in the sum of Twenty-three and 93/100 Dollars (\$23.93), on account of which there was paid to the predecessor in office of this plaintiff the sum of One Thousand and Ninety-six and 70/100 Dollars (\$1,096.70), leaving a balance due and owing of Eight Hundred and Twenty-one and 53/100 Dollars (\$821.53).

III.

That the charges as set forth in the preceding paragraph and covering the transportation of the four cars therein referred to were assessed in accordance with the duly filed and published tariffs and classifications governing the transportation of each of said cars from Camden, New Jersey, to Seattle, Washington, as shown by such tariffs and classifications as duly filed with the Interstate Commerce Commission of the United States and then in effect.

IV.

That due demand has been made upon the defendant for the payment of the balance owing on account of the transportation [5] charges accruing on each of said four cars, and that the defendant has wholly failed and refused to pay the same or any part thereof, and that there is now due and owing to this plaintiff, as the successor in office of the Director-General of Railroads then operating the Northern Pacific Railroad, freight charges covering the transportation of P. R. R. car 294966, as above referred to, in the full sum of Eight Hundred and Seventy-eight and 80/100 Dollars (\$878.80), with interest at the legal rate from the 8th day of April, 1919; on account of transportation of P. R. R. car 294476 freight charges in the full sum of One Thousand and Fifty and 60/100 Dollars (\$1,050.60), with interest from the 5th day of April, 1919; on account of transportation of N. Y. C. car 347714 charges in the full sum of One Thousand, Two Hundred and Sixteen and 43/100 Dollars (\$1,216.43), with interest from the 25th day of

April, 1919, until paid; and on account of transportation of B. & A. car 10229 the full sum of Eight Hundred and Twenty-one and 53/100 Dollars (\$821.53), with interest from the 12th day of May, 1919, at the legal rate.

WHEREFORE, plaintiff prays that he may have judgment against the defendant as follows:

(1) On account of freight charges owing on account of the transportation of P. R. R. car 294966 referred to in the foregoing complaint in the sum of Eight Hundred and Seventy-eight and 80/100 Dollars (\$878.80), with interest thereon from the 8th day of April, 1919, until paid;

(2) On account of the transportation of P.R. R. car 294476 in the full sum of One Thousand and Fifty and 60/100 Dollars (\$1,050.60) with interest at the legal rate from the 5th day of April, 1919, until paid;

(3) On account of the transportation of N. Y. C. car 347714 [6] in the full sum of One Thousand, Two Hundred and Sixteen and 43/100 Dollars (\$1,216.43), with interest thereon at the legal rate from the 25th day of April, 1919, until paid;

(4) On account of the transportation of B. & A. car 10229 above referred to the full sum of Eight Hundred and Twenty-one and 53/100 Dollars (\$821.53), with interest thereon at the legal rate from the 12th day of May, 1919, until paid;

(5) That the plaintiff further have and recover of and from the defendant his costs and disbursements herein to be taxed, and that he have such other and further relief as to the court may seem

meet and equitable and consistent with the proofs upon a hearing hereof.

C. H. WINDERS,
Attorney for plaintiff.

State of Washington,
County of King,—ss.

C. H. Winders, being first duly sworn, on oath deposes and says:

That he is attorney for the plaintiff; that said plaintiff is a nonresident of the state of Washington, and that he makes this verification for and on his behalf, being duly authorized so to do; that he has caused the foregoing complaint to be prepared, knows the contents thereof, and believes the matters and things therein set forth are true.

C. H. WINDERS.

Subscribed and sworn to before me this 3d day of May, 1921.

[Notary Seal] ARTHUR E. SIMON,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 3, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [7]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 5976.

JAMES C. DAVIS, Director-General of Railroads
of the United States and Agent of the United
States under the Transportation Act, 1920,
Providing for the Termination of Federal
Control of Railroads,

Plaintiff,

vs.

PUGET SOUND MACHINERY DEPOT, a Cor-
poration,

Defendant.

Answer.

Comes now the defendant, and answering the
complaint of the plaintiff herein, admits, denies and
alleges as follows:

I.

Answering paragraph I, admits the allegations
therein contained.

II.

Answering paragraph II, admits that shipments
of shafting were made to the defendant from Cam-
den, New Jersey, as alleged in said paragraph, and
further admits that it paid as freight and war tax
the respective sums alleged to have been paid, but
denies that the other and greater sums alleged to
have become due with respect to said shipments

and each of them, ever became due and owing in accordance with the duly published tariff charges governing the transportation of the four cars of shafting, or that any sum greater than alleged to have been paid became due with respect to any one of the four cars mentioned in said paragraph.

III.

Answering paragraph III, defendant denies the charges set forth in paragraph II, covering the transportation of the four cars therein referred to were assessed in accordance with the duly filed [8] and published tariffs governing the transportation in question.

IV.

Answering paragraph IV, defendant admits that demand has been made for the various sums therein set out, and that it has refused and still refuses to pay the same, and has denied and now denies that they, or any part thereof, are due to the plaintiff.

WHEREFORE, having fully answered, defendant prays to be hence dismissed, and have judgment for its costs.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

E. I. Garrett, being first duly sworn, on oath deposes and says: that he is the president of Puget Sound Machinery Depot, a corporation, defendant in the above-entitled action; that he has read the

foregoing answer, knows the contents thereof, and believes the same to be true and correct.

E. I. GARRETT.

Subscribed and sworn to before me this 9 day of November, 1922.

W. L. GRILL,

Notary Public in and for the State of Washington,
Residing at Seattle.

Due service of a copy hereof admitted this 10 day of Nov. 192—.

C. H. WINDERS.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 13, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [9]

[Title of Court and Cause.]

Stipulation Waiving Jury Trial.

It is mutually stipulated and agreed by and between the attorneys for both parties that a jury in this case be and it is hereby expressly waived, and each of the parties hereby agree that the issues in this case may be tried before the above-entitled Court and the Judge thereof without the intervention of a jury.

Dated the 10th day of January, 1923.

GEO. T. REID,

C. H. WINDERS,

Attorneys for Plaintiff.

BRONSON, ROBINSON & JONES,

Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 10, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

BE IT REMEMBERED that this cause came on duly and regularly for trial on the 10th day of January, 1923, upon the complaint of the plaintiff and the answer thereto of the defendant, each of the parties in writing prior to trial waiving a trial of the issues involved by a jury and consenting and stipulating that the cause should be tried before the Honorable E. E. Cushman, United States District Judge presiding in the above-entitled court, such stipulation being in writing and duly filed herein, and the trial of said cause proceeding before the Court without a jury, and the plaintiff having introduced his evidence and rested, and the defendant having introduced its evidence and rested, and the plaintiff having introduced his evidence in rebuttal, and both parties having rested, and the matter being duly presented to the court by argument of the attorneys for the respective parties, and the court having on the 15th day of January, 1923, after such arguments, announced its findings [11] in favor of the plaintiff for the amount as prayed for in his complaint, the Court now makes the following

FINDINGS OF FACT.

I.

That the plaintiff herein was at the time of the institution of this action and at all times since has been and is now the duly appointed, qualified, and acting Director-General of Railroads of the United States and agent of the United States for the purpose of terminating federal control of railroads, as provided by the Transportation Act, 1920, being an act of Congress of the United States providing for the termination of federal control of railroads, and that this action was brought and is maintained by the plaintiff pursuant to the terms of the act of Congress referred to and in connection with the operation by the United States, by and through the railroad administration, of the railroad system of the Northern Pacific Railroad under acts of Congress of the United States known as the federal control acts and proclamations of the President issued pursuant thereto; and that the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, maintaining offices and doing business within Seattle, King County, Washington, within the western district of Washington.

II.

That on the 3d day of March, 1919, there was delivered to a connecting carrier as operated by the then Director-General of Railroads, at Camden, New Jersey, by the Camden Forge Co., one car, to wit, P. R. R. 294966, loaded [12] with 80 flanged shafts, for transportation from Camden, New Jersey, to the defendant at Seattle, Washington, and

which car was thereafter duly transported and delivered by the predecessor in office of the plaintiff, as operating the Northern Pacific Railroad, to the defendant on the 8th day of April, 1919, and the Court finds that there accrued thereon in accordance with the duly published classifications and tariffs duly filed with the Interstate Commerce Commission of the United States, as provided by law, said shipment moving in interstate commerce, charges in the sum of Two Thousand and Twenty-eight and 35/100 Dollars (\$2,028.35), plus war tax in the sum of Twenty-five and 60/100 Dollars (\$25.60), on account of which there was paid by the defendant the sum of One Thousand, One Hundred and Seventy-five and 15/100 Dollars (\$1,175.15), leaving a balance owing of Eight Hundred and Seventy-eight and 80/100 Dollars (\$878.80).

III.

The Court finds that on the 10th day of March, 1919, there was delivered at Camden, New Jersey, by the same consignor, a second car, loaded with 21 flanged shafts, loaded in car P. R. R. 294476, for transportation from Camden, New Jersey, to the defendant at Seattle, Washington, and that said shipment was by the predecessor in office of the plaintiff, the then Director-General of Railroads, operating the Northern Pacific Railroad, delivered to the defendant at Seattle, Washington, on the 5th day of April, 1919; that under the classifications and tariffs duly filed with the Interstate Commerce Commission, as aforesaid, there accrued [13] thereon freight charges in the sum of Two Thousand, Four

Hundred and Twenty-two and 50/100 Dollars (\$2,422.50), plus war tax in the sum of Thirty and 60/100 Dollars (\$30.60), and that there was paid on account thereof to the predecessor in office of the plaintiff the sum of One Thousand, Four Hundred and Two and 50/100 Dollars (\$1,402.50), leaving a balance due and owing of One Thousand and Fifty and 60/100 Dollars (\$1,050.60).

IV.

That on the 22d day of March, 1919, a third car, loaded with 51 flanged shafts, was consigned from Camden, New Jersey, by the same consignor, to the defendant at Seattle, Washington, being car N. Y. C. 347714, which car the Court finds was transported from Camden, New Jersey, in regular course and delivered to the defendant at Seattle, Washington, on the 25th day of April, 1919, the same being transported and delivered by the United States Railroad Administration, as operating the Northern Pacific Railroad, and that there accrued on account of such transportation charges under the duly filed and published tariffs and classifications as filed with the Interstate Commerce Commission, as set forth in the preceding findings, the full sum of Two Thousand, Eight Hundred and Four and 88/100 Dollars (\$2,804.88), with war tax in the sum of Thirty-five and 43/100 Dollars (\$35.43), on account of which there was paid by the defendant to the predecessor in office of the plaintiff the sum of One Thousand, Six Hundred and Twenty-three and 88/100 Dollars (\$1,623.88), leaving a balance due and owing, in accordance with the duly published classifications

and tariffs governing the transportation of such car, of [14] One Thousand, Two Hundred and Sixteen and 43/100 Dollars (\$1,216.43).

V.

That on the 9th day of April, 1919, there was delivered to the then Director General of Railroads at Camden, New Jersey, a fourth car, containing flanged and other shafts, the same being loaded in B. & A. car 10229, for transportation from Camden, New Jersey, to the defendant at Seattle, Washington, and which car the Court finds was thereafter duly transported by the United States Railroad Administration, operating the Northern Pacific Railroad, from Camden, New Jersey, to Seattle, Washington, where delivery was made to the defendant on the 12th day of May, 1919, and the Court finds that there accrued thereon, in accordance with the lawfully published classifications and tariffs, duly filed as provided by statute, freight charges in the sum of One Thousand, Eight Hundred and Ninety-four and 30/100 Dollars (\$1,894.30), with war tax in the sum of Twenty-three and 93/100 Dollars (\$23.93), on account of which the Court finds there was paid to the predecessor in office of the plaintiff by the defendant the sum of One Thousand and Ninety-six and 70/100 Dollars (\$1,096.70), leaving a balance due and owing of Eight Hundred and Twenty-one and 53/100 (\$821.53).

VI.

The Court finds that the charges as set forth in the four preceding findings of fact, and covering the

transportation of the four cars therein referred to, were assessed in accordance with the duly filed and published [15] classifications and tariffs governing the transportation of each of said cars from Camden, New Jersey, to Seattle, Washington, as shown by the tariffs and classifications as duly filed with the Interstate Commerce Commission and then in effect; that said shipments consisted of flanged shafts roughly machine turned, and were properly classified as shafts or shafting, iron or steel, other than crank shafts, without cams, couplings or fittings, and not key-leaved nor key-seated, as shown by items 4, 7, and 9, page 301, of Western Classification No. 55, which was in effect at the time of the movement of said cars, and that such shafts, pursuant to such classifications, were covered by Transcontinental Freight Bureau West-bound Tariff No. 4-O, I. C. C. No. 1049 of R. H. Countiss, Agent, with supplements thereto, the court finding that said shipments were covered by the fifth class rate as designated in said classification, which, at the time of said movements, was \$2.37½ per hundred pounds, the Court finding that the classification as made by the Transcontinental Freight Bureau upon the arrival of said shipments at Seattle so classifying said shipments was a correct classification to be made thereof.

VII.

The Court further finds that repeated demands were made by the plaintiff and his predecessor in office for the payment of the balance of the freight charges accruing on said four cars, and that the de-

defendant prior to the institution of this action and at all times since has failed and refused to pay the same or any part thereof, and that there is now due and owing to the plaintiff from the defendant the [16] full sum of three thousand, nine hundred and sixty-seven and 36/100 Dollars (\$3,967.36), with interest on the unpaid balances from the date of delivery as set forth in the preceding findings.

Done in open court this 30th day of January, 1923.

EDWARD E. CUSHMAN,
Judge.

From the foregoing findings of fact the Court draws the following

CONCLUSION OF LAW.

That the plaintiff is entitled to judgment against the defendant in the sum of Three Thousand Nine Hundred and Sixty-seven and 36/100 Dollars (\$3,967.36); with interest on the sum of Eight Hundred and Seventy-eight and 80/100 Dollars (\$878.80) at the rate of six per cent per annum from the 8th day of April, 1919, until paid; with interest on the sum of One Thousand and Fifty and 60/100 Dollars (\$1,050.60) at the rate of six per cent per annum from the 5th day of April, 1919, until paid; with interest on the sum of One Thousand Two Hundred and Sixteen and 43/100 Dollars (\$1,216.43) at the rate of six per cent per annum from the 25th day of April, 1919, until paid; and with interest on the sum of Eight Hundred and Twenty-one and 53/100 Dollars (\$821.53), at the rate of six per cent per annum from the 12th day of May, 1919, until paid,

together with its costs and disbursements herein to be taxed.

Done in open court this 30th day of January, 1923.

EDWARD E. CUSHMAN,

Judge. [17]

Due service of a copy hereof admitted this 18 day of Jan., 1923.

BRONSON, ROBINSON & JONES,

Attorneys for Def.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 30, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5976.

JAMES C. DAVIS, Director-General of Railroads of the United States, an Agent of the United States Under the Transportation Act, 1920, Providing for the Termination of Federal Control of Railroads,

Plaintiff,

vs.

PUGET SOUND MACHINERY DEPOT, a Corporation,

Defendant.

Judgment.

BE IT REMEMBERED that this cause came on duly and regularly for trial on the 10th day of January, 1923, upon the complaint of the plaintiff and the answer of the defendant, each of the parties filing a written stipulation prior to trial expressly waiving a trial of the questions of fact by a jury and expressly stating that the case might be tried before the Honorable E. E. Cushman, United States District Judge presiding in the above-entitled court, and pursuant to such stipulation the trial of said cause proceeded before said judge without a jury; and the plaintiff having introduced his evidence and having rested, and the defendant having introduced its evidence and having rested, and the plaintiff having introduced his evidence in rebuttal, and both parties having rested, and after argument by the respective counsel, the matter being duly submitted to the Court for determination and decision, the Court on the 15th day of January, 1923, announced its findings in favor of [19] the plaintiff, that he recover of and from the defendant the full amount sued for in his complaint; and the Court having caused findings of fact and conclusions of law to be reduced to writing and filed and entered herein;

NOW THEN, upon motion of the plaintiff for judgment in accordance with the findings of the Court and the findings of fact and conclusions of law heretofore entered herein, it is now by the Court

ordered, adjudged, and decreed that the plaintiff do have and recover of and from the defendant the full sum of Four Thousand, Eight Hundred Sixty-one and 69/100 dollars (\$4,861.69), together with his costs and disbursements herein to be taxed; to all of which the defendant excepts and an exception is allowed.

Done in open court this 30th day of January, 1923.

EDWARD E. CUSHMAN,
Judge.

Due service of copy hereof admitted this 18th day of Jan., 1923.

BRONSON, ROBINSON & JONES,
Attorneys for Def.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 30, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

[Title of Court and cause.]

Order Extending Time to and Including March 1, 1923, to File Bill of Exceptions.

It is hereby ordered that the time for filing proposed bill of exceptions in the above-entitled case is hereby extended to the first day of March, 1923.

Dated at Seattle, Washington, this 9th day of February, 1923.

EDWARD E. CUSHMAN,
Judge.

O. K.—C. H. WINDERS.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 9, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

[Title of Court and Cause.]

**Notice of Application to have Bill of Exceptions
Certified.**

To James C. Davis, Director-General of Railroads of the United States, and Agent of the United States under the Transportation Act, 1920, providing for the termination of Federal control of Railroads, plaintiff in the above-entitled cause, and to Chas. H. Winders, Esq., his attorney:

You, and each of you, will please take notice that on Monday, the 19th day of March, 1923, the defendant in the above-entitled cause, by its attorneys, Ira Bronson, J. S. Robinson and H. B. Jones, will apply to the above-entitled Court to have certified the bill of exceptions heretofore prepared and proposed by the defendant in the above-entitled cause.

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,

Attorneys for Defendant.

Due service of a copy hereof admitted this 7th day of March, 1923.

C. H. WINDERS,
(J.)
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 7, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

[Title of Court and Cause.]

Bill of Exceptions.

This cause coming on regularly for hearing on this 10th day of January, 1923, before the Hon. Edward E. Cushman, Judge of the above-entitled court, the trial being before the court, the parties having waived a jury, and the plaintiff appearing by his attorney of record, Charles H. Winders, Esq., and the defendant appearing by its attorney, Ira Bronson, Esq., of the firm of Bronson, Robinson & Jones, the following proceedings were had and testimony taken, to wit:

Herewith follows a transcript of all the testimony given at the trial, the same being set forth in full to enable the appellate court to determine the correctness of the Trial Court's ruling in refusing to make and find certain findings of fact and conclusions of law proposed by the defendant, and in making and entering findings of fact, conclusions of law and judgment in favor of the plaintiff. [23]

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Testimony of A. B. Cade, for Plaintiff.

A. B. CADE, produced as a witness on behalf of plaintiff, being first duly sworn, testifies as follows:

Q. (Mr. WINDERS.) State your full name.

A. A. B. Cade.

Q. And what is your employment?

A. Superintendent, Transcontinental Freight Bureau, Weighing & Inspection Department, North Pacific Coast Territory; headquarters, Seattle, Washington.

Q. Were you occupying that position in the year 1919 at the time the four cars in controversy in this case moved and were delivered? A. I was.

Q. Located at Seattle? A. At Seattle.

Q. How long have you been connected with that department and familiar with similar work?

A. Approximately, 39 years.

Q. What is the Transcontinental Freight Bureau; what is its work?

A. You mean the Weighing & Inspection Department?

Mr. BRONSON.—I don't think that has anything to do with it; what we want to do is to establish the character of this commodity. I will admit that Mr. Cade's connection is such as to enable him to describe the material.

The COURT.—The objection is overruled.

A. The Weighing & Inspection Department of the Transcontinental Freight Bureau is established

(Testimony of A. B. Cade.)

in the interest of both carriers and shippers alike, to see that goods are properly [25—4] described so that the proper rates may be applied by carriers, and we employ inspectors at the terminal stations for that purpose, whose duty is to examine freight received, both carload and less than carload, to see that they are properly described under the provisions of established tariffs, and if they are not properly described under the provisions of established tariffs it is their duty to so describe them.

Q. Does this inspection bureau cover all of the railroads in the Northwest?

A. It does; that is all of the transcontinental lines and many of the smaller lines.

Q. Have you the record of inspection of these cars?

A. I have the inspector's record. The inspector who examined these particular shipments died recently, so we have not the inspector with us who personally examined those shipments.

Mr. BRONSON.—We are perfectly willing that they should introduce these records of ours.

Q. Mr. Cade, in reference to these shipments that are involved in this case and covered by these four cars—you are familiar with shipments of the character that were moved during that period and particularly during the war period—shafts of those various kinds?

A. I am. (Examining blue-print.) These as illustrated by the blue-prints before me are forged

(Testimony of A. B. Cade.)

shafts equipped with flanges, having a flange at either end.

Mr. BRONSON.—I would like to submit to your Honor my view of the competency of Mr. Cade's evidence, because it is largely determinative of the case. We [26—5] have no objection to Mr. Cade's testimony to the physical characteristics or a minute description of the material in these four carloads, in fact, we will agree with Mr. Winders and let the Court have the plan and it shows what it is, but we do contend, if your Honor please, that Mr. Cade is not competent to testify as to whether this material is within the classification in this freight rate—that is what we want your Honor to decide is as to what it is in the language of the freight rate. Now, I have an idea from the way he starts out here that he is going to define this in the line of the description within the terms of this Transcontinental Freight Rate, and that is the question for your Honor to decide.

The COURT.—It is only natural with a man more or less familiar with these things that expressions will creep into his testimony in which he characterizes the subject matter of this freight, this shipment, using the expression "Flange" or any other descriptions, but I do not see that that renders his testimony incompetent. The question still would be for decision, if the Court was able to decide it. It does seem to me, from the way you start out that it is, instead of being purely a question of law that it is a question of proper classifica-

(Testimony of A. B. Cade.)

tion which requires technical knowledge of the shipment.

Mr. BRONSON.—I do not think, if your Honor please, when the evidence is in, if Mr. Winders will read his classifications to the Court in the beginning, that [27—6] there will be any question except the question of law.

Mr. WINDERS.—Of course, if your Honor please, it is a question of expert testimony here as to what these statements consisted of. There is a provision of the tariff from which it might be contended as I understand it that these were forgings or some kind of shafting, as Mr. Bronson says. It is our contention that they come under the provisions of the classification of shafts and shaftings not key-leaved nor key-seated, loose or in packages, as provided for in this tariff.

The COURT.—Key-seated there means they became a part of the machine.

Mr. WINDERS.—Yes. Not key-leaved nor key-seated; and if they were they would take the class “A” rate.

The COURT.—You may proceed. The objection is overruled.

Mr. WINDERS.—I think first I will offer in evidence at this time—and they can be withdrawn if you desire—the specifications and drawings of the material that was on these four cars, as produced by the defendant.

Mr. BRONSON.—We have no objection, but the drawings include more.

(Testimony of A. B. Cade.)

The COURT.—They may be admitted.

(Received in evidence and marked, respectively, as follows: Blue-prints marked Plaintiff's Exhibits Nos. 1, 2, and 3 and specifications marked Plaintiff's Exhibit No. 4.)

Q. Referring to Plaintiff's Exhibit No. 4 and, in connection therewith, Exhibits Nos. 1, 2 and 3, which counsel on behalf of defendant has produced as covering the specifications [28—7] by Exhibit No. 4, and by Exhibits Nos. 1, 2 and 3 the plans of the commodity on these four cars, I will ask you whether you have examined them.

A. The material?

Q. The plans and specifications. A. I have.

Q. Do those plans and those specifications correspond with the classifications as made by your department at the time this shipment arrived?

A. They do.

Mr. BRONSON.—That is the exact question which the Court should decide. This witness could not bind us and I do not think his evidence is competent—I do not think his opinion is any value in enabling your Honor to define what that rate means. He says it is a certain classification, and it is incompetent.

The COURT.—I do not see how a Court is going to determine a technical matter of this kind without the opinion of somebody who knows more about it than the Court does.

Mr. BRONSON.—I want to point out the ground of my objection. Here is the definition in the rate

(Testimony of A. B. Cade.)

which was in force at the time, "Shafting plain (See Note 1)." Note 1 "Carload rates apply only on plain shafting without connections."

Now, this material in controversy here is a piece of metal 24 feet long and so many inches in diameter. It is flanged on one end which is made part of it when it is made, and perhaps on the other end, and that is all there is to it. Now, the question is [29—8] is that "Plain shafting without connections" or under "Forgings, not further finished than being drilled with bolt holes." Now, those two paragraphs cover this case and we will describe the material to you exactly.

The COURT.—I can understand and go to the extent that we are looking at an object such as you have described there, without the Court knowing the other forms that the machines might take, that the Court might conclude that it was a shaft as it stood alone under that definition; but if an expert can point out the gradations and the way that one piece of a machine and the description of it fits into another until you reached a place eventually where one description ceases to be proper and another description becomes applicable, why the Court would be groping around more or less unless experts were put on the stand to give their opinion and to point out the differences and what would create the differences, and it may be that I will disregard those, because it is just a bald expression of opinion without giving the Court anything

(Testimony of A. B. Cade.)

really, but I cannot decide the case without hearing testimony.

Mr. BRONSON.—So as to get the record in proper shape, will your Honor allow me, then, to interpose the further objection that Mr. Cade is not competent as a mechanic or expert?

The COURT.—Evidently he knows more about it than the Court does in a general way—the objection is overruled. [30—9]

Q. (Mr. WINDERS.) Do these blue-print drawings and plans as now presented by the defendant cover the material involved in this shipment?

A. That is my understanding. But may I proceed in my own way? Q. Yes.

The COURT.—Now, I understand the effect of that is that these plans and specifications show what was actually shipped?

Mr. WINDERS.—Yes.

A. They speak for themselves. The material as originally shipped from Camden, New Jersey, was described by shippers as so many pieces of rough forgings. Upon arrival at Seattle they were inspected by an inspector in my employ who, after an inspection of the material described them as rough-turned shafts, and, under a ruling received from the Western Classification Committee he also, in parentheses, described them as machinery, indicating that the machinery carload rate was applicable. The material as indicated by blue-print and specifications shows the shipment or shipments to have consisted of what is termed rough-machined

(Testimony of A. B. Cade.)

line shafts with flanges which are used as a coupling in connecting the lines. Those flanges—this material is further finished than is provided for in the commodity tariffs which do provide a rating on forgings not further finished than being drilled with bolt holes.

These particular shafts have been placed through a lathe and rough turned to within somewhere, I should say, within $\frac{1}{8}$ of an inch of their final finished dimension.

Under the conditions in which these particular shipments moved the provision in our transcontinental west-bound [31—10] commodity tariffs for forgings not further finished than bored with bolt holes, would not be applicable as they are specific provision and cover articles specified only, and would not apply upon an analogous article.

We also carry in our westbound commodity tariffs a provision for plain shafting, and it is the understanding of myself and the traffic officials in the interested north coast lines—

Mr. BRONSON.—(Interposing.) It is understood that we have an objection to all of this as irrelevant, immaterial and incompetent.

The COURT.—Yes.

A. (Continuing.) The understanding of the chairman of the Western Classification Committee that this type of shafting is not what is known to the trade in general as plain shafting; plain shafting being a round bar polished, sometimes cold-drawn, as they term it, through a die, which is used in

(Testimony of A. B. Cade.)

transmission machinery where they run a line of shafting from one end of a building to another. That is a straight bar of steel similar to my pencil (illustrating), excepting various dimensions, without any coupling or any flange or any shoulders like that (illustrating). That is what is termed plain shafting.

If this shafting is equipped with an extending flange, shoulders or projections of any kind, it ceases to be what is termed plain shafting in the classification sense.

Western Classification 55 was in effect at the time these particular shipments moved, and we referred the question, with an illustration of the character of the material, to the Western Classification Committee of Chicago, [32—11] and I received from them a letter under date of August 8, 1919, which says: "Referring to yours of August 4th"—

Mr. BRONSON—We object to this, of course, on the further ground that it is mere hearsay.

Mr. WINDERS.—I do not think I will insist on that letter.

Q. Now, Mr. Cade, have you with you the classification and tariff which were in effect at the time these shipments moved?

A. I have (producing book).

Q. I wish you would please give the reporter by number and date effective and Interstate Commerce number, the classification which was in effect at the time this shipment moved.

A. Western Classification—

(Testimony of A. B. Cade.)

Q. Yes.

A. Western Classification No. 55, I. C. C. No. 13. It became effective April 1, 1918, and was in effect until December 29, 1919.

Mr. BRONSON.—Is that this “No. 4-O” here, this other book?

The WITNESS.—No. This is Western Classification No. 55. I will give you the Bureau tariff number.

Mr. WINDERS.—“4-O” is the tariff—this is the classification.

Q. That was the classification that was duly filed and in effect at the time with the Commission?

A. It was.

Q. Turn to that Classification and advise the Court what, in your opinion, was the classification that this material [33—12] as shown by the blue-prints and specifications introduced in evidence here, would come under—what page and what items?

A. On page 301, Western Classification No. 55, Items 4 and 9.

Item 4 reads as follows: “Shafts or shafting, iron or steel, other than crank shafts”: That is a sub-caption to a general head covered at the top of the page for “Machinery and machines.”

Item 9, it is covered under sub-caption shown by Items 4, 7 and 9. Item 7 reads “Without cams, couplings or fittings.”

Item 9 says “Not key-leaved nor key-seated;

(Testimony of A. B. Cade.)

loose or in packages, carload, minimum weight 63,000 pounds, class 5th."

That is the item and classification that we understand to be applicable on the shipments in question.

Q. Now, Mr. Cade, I will offer in evidence this Western Classification. Have you the tariff that was in effect and the supplements thereto at the time these four cars moved? A. I have.

Q. For the purpose of the record will you state the number of that tariff, when published and the I. C. C. number and also the date effective?

A. Transcontinental Freight Bureau Westbound Tariff No. 4-O, became effective March 15, 1918; I. C. C. No. 1049 of R. H. Countess, Agent, and this tariff was in effect during 1919. I have not with me the effective date.

Q. Was there a supplement to that tariff?

A. There are many supplements. [34—13]

Mr. BRONSON.—You mean the one increasing it 25%?

Mr. WINDERS.—Yes.

Mr. BRONSON.—I will admit that.

Q. Will you refer now, Mr. Cade, to the page, and give the Court the page of this original tariff No. 4-O which carries the rate on commodities classified as you have just testified you classified these shipments?

A. The rates governed by the provisions of Western Classification 55 are as shown on page 151, Index No. 1.

Q. The grouping there shown on that page in

(Testimony of A. B. Cade.)

that item covers the charges for the territory from Camden, New Jersey, to Seattle, Washington.

Mr. BRONSON.—The record may show that we will admit that the classification as to tariff is correct and that there was a 25% increase flat on all the rates applied by supplemental tariffs which you have not got here.

Mr. WINDERS.—I have it here. These tariffs are rather complex, but I want to show this:

It is agreed that the tariff No. 4-O on 5th-class commodities such as Mr. Cade has classified these shipments, was \$1.90 per hundred pounds; that prior to the movement of this shipment there had been a supplement to this tariff published adding 25%, so that the effective rate at the time this shipment moved, in accordance with the classification Mr. Cade has testified to, was \$2.37½.

Mr. BRONSON.—Yes; that is right, if his classification is correct.

Q. What is the purpose of the classification and of the tariff— [35—14] that is, in the tariff you will find some articles specifically defined and others you do not.

A. The classification names the ratings, generally speaking, on all freights moving within the scope of the territory governed by it, and in the absence of any specific commodity rate, so-called, the class rates govern. Commodity tariffs are exceptions to the provisions of Western Classifications and take precedence over them when the rates are less. Commodity rates are made to take care

(Testimony of A. B. Cade.)

of trade conditions, heavy body of movement and so forth.

Q. In other words, the movement of the great bulk of the commodities is governed by the classification which names a classified rate, which you would turn to the tariff to find; such as Class "A" and "B" and 5th class? A. Yes.

Mr. BRONSON.—I don't think that is material.

The COURT.—I don't think it is.

Q. Now, Mr. Cade, you have testified that these four cars came in billed as rough forgings and that your department changed the transportation.

A. Description.

Q. I think for the purpose of this record I will ask you to turn to the provisions of the tariff covering rough forgings.

Mr. BRONSON.—You mean "4-O"?

A. Transcontinental Freight Bureau Westbound Tariff 4-O, on page 296, Item 3540, under the caption of "Iron and steel, articles of," shown on the top of the page, is shown "Forgings, N. O. S., not further finished than being drilled with bolt holes, minimum carload rate 50,000 pounds; carload [36—15] rate from group 'A' territory to Seattle \$1.10 per one hundred pounds," that being increased by 25% under supplement which would be applicable on that type of material at the time shipment moved.

The term "N.O.S." used in this item means "Not otherwise specified in this tariff."

(Testimony of A. B. Cade.)

Q. Now, Mr. BRONSON has also referred to a provision in that same tariff covering shafting. I think I will offer that provision in evidence.

A. On page 293, tariff referred to, Item 3450, said item being carried under the caption of "Iron and steel, articles of," there is a provision for shafting, plain (See Note 1), minimum carload weight 80,000 pounds, subject to Note 3, from Camden, New Jersey, to Seattle, Washington, of \$1.10 per one hundred pounds, plus the 25% increase referred to.

Mr. BRONSON.—We admit that also—that there is 25¢ added. Will you read the notes, too?

The WITNESS.—Note 3?

Mr. BRONSON.—Note 1.

The WITNESS.—Note 1, "Carload rates apply only on plain shafting without connections." Note 3. On shipments containing articles which, on account of length, require two or more cars to transport them, the minimum charge at the carload rate for each series or lot, not to exceed three cars in any one lot or series, shall be as follows: which case refer to minimums which would not be applicable on this, because these are single shipments.

Q. (Mr. WINDERS.) Well, the specifications are in evidence. Were these various articles which are in controversy here [37—16] flanged at either end?

A. These shafts in these shipments were flanged at one end or both ends from the description as shown in the inspector's record and from the de-

(Testimony of A. B. Cade.)

scription shown on the blue-prints and specifications submitted by the defendant.

Q. Where is that flanged other than at the end?

A. Just at the end.

The COURT.—Did they carry bolt holes in those flanges?

The WITNESS.—They were not bored. The only machine work done on them was turning them in the lathe, dressing them down to the $\frac{1}{8}$ inch.

The COURT.—Where would you understand would be bolt holes in the shafts except through the flanges?

The WITNESS.—That is the only place, but they were not bored in this instance—the boring being done here.

Mr. WINDERS.—If they are bored they would take the class “A” rather than the 5th class rate.

The COURT.—Will you read Item 3450 again?

Mr. BRONSON.—3540 is the one your Honor wants.

The COURT.—I want you to read the one that refers to the bolt holes.

Mr. BRONSON.—3540.

The WITNESS.—3540, that is the rate on forgings.

The COURT.—What was the last one which you read?

The WITNESS.—3450.

The COURT.—He said, “Not further finished than being drilled with bolt holes.”

The WITNESS.—That is Item 3540, on page 296,

(Testimony of A. B. Cade.)

“Forgings, N. O. S., not further finished than being drilled with [38—17] bolt holes.”

The COURT.—That does not touch shafting at all?

The WITNESS.—That applies to all types of forgings that are not further finished than as described, regardless of whether they are shafting or any other type.

The COURT.—If they are forgings they are not shafting.

The WITNESS.—A shafting may be a forging, in its rough stage, which I will illustrate to you by pamphlets which I have here. (Showing.) This pamphlet illustrates a steel ingot as poured into a mold; the ingot is then put into the furnace, heated and put under the hammer or press, illustrating what is termed a forging (showing) and, if it please your Honor, that is rough and still a forging, but it is in rough stage. There is a forging (showing another picture). Now, that later is put through a lathe. This shows a shaft in the lathe being turned (showing). That is the machine work that is placed on the article which brings it out and shows a further finish than the rough forging; that is turning down to a required dimension as shown in the specification.

Q. (The COURT.) And what you call a forging out of which it is intended to make the shaft, you would call it shafting?

The WITNESS.—If it was intended for a shaft in the rough stage which I will refer to by this cat-

(Testimony of A. B. Cade.)

alog, you would term it a forging, as illustrated here (showing). That would be a forging in its present stage while intended for a shaft it would not be a shaft, it would be only a forging; but when turned and dressed [39—18] down it then ceases to be a forging and becomes a shaft.

The COURT.—A forging takes a higher rate than a shaft?

The WITNESS.—No; they take about the same rate in the commodity tariff.

Q. (Mr. WINDERS.) Mr. Cade, was there considerable—or has your experience brought you in touch with a considerable quantity of shipments of this character? A. It has.

Q. And with a considerable quantity of just plain forging? A. It has.

Q. Was there a considerable quantity of this character of material which had been lathed or machined down to $\frac{1}{8}$ inch of the final finish, moving during the same period to this country?

A. A very large quantity; in fact, all over the Pacific Coast.

Q. And flanged as this was? A. Yes.

Q. Has there been any classification made or tariff applied in connection with the movements of any of this same commodity at a rate lower than the 5th class rate covering shafts and shafting?

Mr. BRONSON.—You are asking him for a conclusion of law.

Q. I will ask you whether any inspector, any classification committee, any carrier, any commis-

(Testimony of A. B. Cade.)

sion, or anyone else, in consideration of the classification and tariff to be applied to this material has applied any different or other or lower classification than that to which you have testified—you have testified there were large quantities [40—19] of it moved here on the Pacific Coast.

Mr. BRONSON.—I do not think that that is material—I object to it as irrelevant, immaterial and incompetent.

The COURT.—The objection is overruled.

A. There has been a very heavy movement of this same material, line shafts, tail shafts and thrust shafts used in the shipbuilding industry during the war period, and our inspectors have watched the movement and properly described the material, and the 5th class rate has been applied. In some instances the class “A” rate has been applied through misunderstanding, which is 2¢ per hundred pounds higher than the 5th class rate from that particular territory.

But the 5th class rates have been generally applied by all the North Coast lines and the lines leading into California, on this type of material until at a later date a specific rating was provided by the West Bound Commodity Tariff.

Q. Did you take part in the hearing on this same question of proper classification before the Interstate Commerce Commission? A. I did.

Q. And in that Northwest Steel Company case before the Commission did it cover the identical character of material that is involved here?

(Testimony of A. B. Cade.)

A. The same type.

Mr. WINDERS.—I might say that this same material has been before the Interstate Commerce Commission, and subsequently there was a lower rate put into effect. [41—20]

The WITNESS.—Yes, there was.

Q. After this movement?

A. Yes; that was in Transcontinental Freight Bureau Westbound Tariff 4-P.

Cross-examination.

Q. (Mr. BRONSON.) In other words, the Interstate Commerce Commission formulated a lower tariff rate for this class of material?

A. No; I would not say that. The Transcontinental lines established at the request of manufacturers and consignees both, a lower rating on this particular commodity just as was specified in their tariff 4-P, which you, probably, have before you. The Northwest Steel Company of Portland, Oregon, brought suit—

Mr. BRONSON.—I don't care for all that.

Q. The rate on this material is what, now?

Mr. WINDERS.—I don't think that is material.

Mr. BRONSON.—I am cross-examining him on the very point which you asked him.

A. The rate on this rough turned shafts, you want to know what it is now?

Q. Yes.

A. The tariff specifically provided for it now, and I have not got the tariff with me; but there has been some—

(Testimony of A. B. Cade.)

Q. Don't you know what it is?'

A. The description is full and complete in the tariffs. I cannot say right offhand.

Q. You know it is \$1.60?

A. No, sir; I can't say that. [42—21]

Mr. WINDERS.—I will admit it is \$1.69.

The WITNESS.—The tariffs will speak for themselves; but there is a specific provision for that material now in the tariffs—there was not a specific provision then.

Mr. WINDER.—It is \$2.03 now, but at one time it was \$1.69.

Mr. BRONSON.—In 4-P, it is \$1.69.

Mr. WINDERS.—Yes, but later it is raised to \$2.03, but I object on the ground that it is immaterial.

The COURT.—The objection is sustained.

Q. (Mr. BRONSON.) You do not know of your own knowledge what this material was, do you?

A. I did not see it.

Q. Are you forming your opinion as to what you testified here from the specifications and the drawings?

A. I formed my opinion from the specification, blue-prints and from the description as shown by my employee who personally inspected the shipment or shipments.

Q. How much of your opinion is based on what your employee told you?

A. The employee did not tell me anything. You see, he is dead and has been dead for several months

(Testimony of A. B. Cade.)

—the employee who inspected these shipments passed away. From his record, and my general knowledge of the character of the commodity—I have personally examined many hundreds of car-loads.

Q. I understand that, but as to this particular shipment your testimony is based upon the records which your subordinate made.

A. And your blue-prints and specifications.
[43—22]

Q. Can you testify as you have testified from the blue-prints and specifications alone?

A. Well, I think I could, if it was admitted by you gentlemen as to the character of the material contained.

Q. I say, have you done so; is your opinion based on the blue-prints and specifications or is it based on the report of subordinates?

A. It is based on the report of my employee, as I stated, his inspection record supported by your blue-print and specifications and my general knowledge of the commodity.

Q. Have you gone through these specifications?

A. Not carefully—not necessarily.

Q. Have you gone through them at all?

A. I have looked over them, yes.

Q. What part of this Plaintiff's Exhibit No. 1 do you take into account in your testimony in describing the material?

A. The illustrations as shown by circle 1, 2 and 3.

(Testimony of A. B. Cade.)

Q. Do you take these circled figures off at the left here?

A. No, not necessarily. This illustrates the type of shaft.

Q. Do you understand this represents the shaft as it was shipped out here?

A. I understand this represents the flange and the bore.

Q. Do you understand that these bolt holes were drilled in the flange?

A. I do not. In fact the record of the inspector that examined the shafting shows it was not bored; that it was machined within $\frac{1}{8}$ inch of its final dimensions.

Mr. WINDERS.—Have you any objection to the classification—I want to offer it in evidence.

Mr. BRONSON.—I do not think it is competent, relevant [44—23] or material and I formally object to it. I do not dispute that it is a correct document.

The COURT.—It will be admitted.

(Bound volume of Western Classification No. 55 marked Plaintiff's Exhibit No. 5.)

Mr. WINDERS.—You are raising no point that it is not certified?

Mr. BRONSON.—No; not at all.

The COURT.—I take it that it should be admitted in order for the Court to determine what classification does cover it.

Mr. BRONSON.—I do not think it is a determinative feature.

(Testimony of A. B. Cade.)

Mr. WINDERS.—I also offer in evidence West-bound Tariff No. 4—O, and supplement.

(Marked Plaintiff's Exhibit No. 6.)

Mr. WINDERS.—In illustrating to the Court the witness referred to certain photographs in this catalog, and I will offer those as part of his testimony—just those pages that the witness referred to.

The WITNESS.—Take the one in the rough first, and the machined second and the lathed third.

(Pages from catalog above referred to are marked, respectively, Plaintiff's Exhibits 7, 8 and 9.)

Q. What is Exhibit No. 9?

A. That shows it after it has been through the lathe, either rough turning or finishing.

Q. And Exhibit No. 8 shows it in the lathe?

A. In the lathe, being turned.

The COURT.—The question in the case is not on classification [45—24] then but it is simply a question of the particular tariff that covers it; that is, which description comes the nearest to*these articles.

Mr. BRONSON.—That is our contention.

Mr. WINDERS.—I think that is true.

The COURT.—And there is no dispute but the one tariff to cover it all, it is a question of which rate—no one contends it should be divided up.

Mr. WINDERS.—No, it is all the same.

Mr. BRONSON.—Yes, that is correct.

Q. Now, you are not a machinist? A. No, sir.

(Testimony of A. B. Cade.)

Q. You have had no experience as a machinist or with machinery?

A. Not except in a general way.

Q. You have been employed all of your life with the railroad?

A. Yes, but my employment with the railroad brings me in contact with every industry, and in following my profession it is necessary for me to go through factories and watch the method of procedure before and after, which is very frequently done. We have to have the knowledge acquired thereby in handling questions which are brought before us, so whenever it is found necessary—

Mr. BRONSON.—That is all.

A. —we make a detailed investigation at the plant.

Mr. BRONSON.—That is all.

Q. (Mr. WINDERS.) Mr. Cade, the specifications offered here do show that this material was to be lathed down to $\frac{1}{8}$ inch of the final finish?

A. They do.

Q. And from the plans and specifications presented to you [46—25] Mr. Cade, only without anything your inspector said, would your classification be the same? A. It would.

(Witness excused.)

Testimony of T. W. Meckstroth, for Plaintiff.

T. W. MECKSTROTH, produced as a witness on behalf of plaintiff, being first duly sworn, testifies as follows:

(Testimony of T. W. Meckstroth.)

Q. (Mr. WINDERS.) State your full name.

A. T. W. Meckstroth.

Q. Mr. Meckstroth, were you agent for the United States Railroad Administration operating the Northern Pacific Railway located at Seattle at the time these four cars moved? A. Yes.

Q. And was the matter of the delivery and the collection of the charges under your jurisdiction and supervision? A. Yes, sir.

Mr. BRONSON.—I do not think there is any dispute as to what we paid. The allegations of the complaint are correct as to the amount which we paid and the amount which you claim is due; we have no dispute.

Q. The original bills, the expense bills as presented were based upon the class "A" rate, or \$2.40? A. Yes.

Q. And the Puget Sound Machinery Depot Company contended that \$1.37½ is correct, and paid that rate? A. Yes. [47—26]

Q. And later you received a ruling from the Western Classification Committee and you reduced the expense bill to \$2.37½? A. Yes.

Q. According to the 5th class rate? A. Yes.

Q. Merely for the purpose of having this before the Court I will ask you if these four copies of expense bills covering the charges which you contend were owing together with the war tax accruing, were prepared under your direction, and copies of those delivered by you to the Puget Sound Machinery Depot.

(Testimony of T. W. Meckstroth.)

Mr. BRONSON.—We admit all of that.

Mr. WINDERS.—I will then offer in evidence the copies of the expense bills showing the amount paid and the amount still owing on these cars in accordance with the rate based upon \$2.37½ per hundred pounds plus the war tax.

(Marked Plaintiff's Exhibit No. 10.)

Q. Those expense bills contain a correct description of the property and the weights of the property that was handled in accordance with the bills of lading which you just checked over? A. Yes.

Q. There is only one other question I want to ask you. When you presented these expense bills to Mr. Walker did you suggest to the Puget Sound Machinery Depot at that time and to Mr. Campbell that he should pay those charges and then if the rate was too high, file a claim for reparation with the Commission? [48—27] A. Yes, sir.

Mr. BRONSON.—That is true all right enough; but I don't think it is material.

The COURT.—If you say it is true, I will sustain the objection as being admitted.

Mr. WINDERS.—It is admitted that all the freight charges that have been paid have been on the basis of \$1.37½.

Mr. BRONSON.—Yes.

Mr. WINDERS.—In connection with this case I will offer in evidence, in connection with the definition of these materials, the opinion of the Interstate Commerce Commission in Cause No. 11973, found in Vol. 66, Interstate Commerce Commission

(Testimony of T. W. Meckstroth.)

Reports, on page 633. I offer that only to show, in connection with the finding that this material was not forgings; it was shafts and shafting, as contended for by Mr. Cade.

Mr. BRONSON.—You offer to prove that it was found that this rate was not reasonable and was reduced?

Mr. WINDERS.—No, sir; I am offering the portion of the opinion in which they find that the classification at the time under the tariff existing was correctly the 5th class, and it was not rough forgings.

Mr. BRONSON.—Well, I don't think that that is competent evidence in this case, or that it should have any weight with the Court. It is not fixed by any law that I know of as having any evidentiary weight to the Court. It is not competent for them to render an opinion which is binding on the Court, and I object to this expression of their opinion on this [49—28] matter.

The COURT.—It will be admitted as Plaintiff's Exhibit No. 11.

Mr. BRONSON.—I think if he offers any part of it he should offer it all.

The COURT.—No objection being made—

Mr. BRONSON.—I object to any part of the opinion, but I say if he offers it he should offer it all.

The COURT.—Objection being made to a part of it being considered without the whole decision,

(Testimony of T. W. Meckstroth.)

the objection will be sustained and the whole of the decision will have to go in the record.

Mr. WINDERS.—I have no objection to offering the whole decision, and I only want to do this; I want to offer the whole decision in connection with the determination of the proper classification of this material. It is admitted in this case we have asked these people to pay this rate and file their application for reparation. Under the law, of course, the probabilities are they would be entitled from the Commission to some relief. Now, I am not offering it for that purpose. I am offering it for the purpose of showing the classification that is adopted.

Mr. BRONSON.—I offer now in open court to have judgment entered against us for the difference between what we paid and what the Commission found to be right—we are perfectly willing to pay it.

Mr. WINDERS.—This Court has not any jurisdiction on that; all this Court can do is to enforce the tariff rate, and then you can go to the Commission. I would like [50—29] to have you file your claim for reparation.

The COURT.—You do not have to read all that, but what you depend on being part of the decision and it not being admitted between counsel what part is applicable the whole decision will have to go in, but you can use such parts as you choose.

Mr. WINDERS. — (Reading:) “Complainant corporations, Northwest Steel Company and Co-

(Testimony of T. W. Meckstroth.)

lumbia River Shipbuilding Corporation, were engaged at Portland, Oreg., during the period covered by the complaint, in the construction of steel ships for the United States Shipping Board, Emergency Fleet Corporation. The complaint filed November 27, 1920, alleges that the rates charged on 25 carload shipments of 'steel forgings' from Camden, N. J., Buffalo, N. Y., and Gary, Ind., to Portland during the period from July 14, 1918, to September 6, 1919, were unjust and unreasonable to the extent that they exceeded certain commodity rates subsequently established. The complaint was orally amended at the hearing to include additional shipments. An intervening petition filed at the hearing by the Todd Dry Dock & Construction Corporation, United States Navy Department, and United States Shipping Board, Emergency Fleet Corporation, attacks the rates charged on shipments of similar commodities moving during the same period from Nicetown and Titusville, Pa., to Tacoma, Wash. Reparation is asked by complainants and interveners. Rates will be stated in amounts per 100 pounds.

"Complainants' shipments moved over the defendant carriers' line and consisted of rough turned solid forged-steel shafting of three distinct types known as thrust, line, and propeller or tail shafts. The thrust shafts were 9 feet long and weighed approximately 8,500 pounds each. They had a flange turned on one end and, at about the middle, several smaller flanges or collars. The

(Testimony of T. W. Meckstroth.)

line shafts were 22.5 feet long, weighed approximately 12,500 pounds each and had flanges turned on both ends. The propeller or tail shafts were 17 feet long with a flange turned on one end and tapered at the other end. They weighed approximately 9,000 pounds each. The specifications under which the shafting was manufactured provided that it should be rough turned before shipment to within one-eighth or one-sixteenth inch of final dimensions. The specifications were largely disregarded by the manufacturers. Most of the shafting was not rough turned down as much as it should have been, and the rough turning was in substance merely a precautionary measure taken by the manufacturers to detect flaws which might otherwise go undetected at the mills and result in rejection [51—30] at destination. The final turning which produced the finished shafting was done at destination at the expense of complainants. The shafting comprising interveners' shipments was similar to that comprising complainants' shipments, except that certain of it was hollow and of somewhat different dimensions. From a rate standpoint it is entitled to the same treatment.

“Certain of the shipments were originally billed as rough forgings but the billing was changed en route or at destination by defendants' inspectors and charges were ultimately collected on most of the shipments on basis of the applicable fifth-class rates of \$2,375 from Camden and Nicetown, \$2,315 from Buffalo and Titusville, and \$2.19 from Gary.

(Testimony of T. W. Meckstroth.)

Other shipments charged class-A rates were overcharged. The current western classification provided that 'shafts or shaftings, iron or steel, other than crank shafts, without cams, couplings or fittings, not key-leaved nor key-seated,' would take fifth-class rates. Witnesses for defendants testified that in their judgment all of the shipments should have been charged class A rates applicable to 'shafts or shaftings, iron or steel, with couplings only attached.' The articles shipped do not fall within this description. While they had flanges which were used in bolting them together to make the assembled shafts, these flanges were not couplings as that term is used in the classification. The term 'coupling' is not specifically defined in the classification but the manner in which it is used therein signifies that it is a separate article and not an integral part of one of the articles that are to be coupled together. Furthermore, some of the thrust shafts had collars turned upon them, whereas the class A rating applied on shafting with couplings only attached.

"The articles shipped were not rough forgings as contended by complainants and interveners. While not finished shafting, they had progressed in manufacture beyond the forging state and were cognizable as shafting."

Mr. WINDERS.—I think I will offer in evidence only one letter, for the purpose of showing that at the time that this shipment moved not only was it billed as forging, but it was your contention that it

(Testimony of T. W. Meckstroth.)

was forgings; that is your letter returning our expense bills and attempting to base it on the \$1.37½ rate on rough forging. [52—31]

Mr. BRONSON.—We have no objection to that. We admit that was written.

(Letter marked Plaintiff's Exhibit No. 12, and read into the record as follows:)

Plaintiff's Exhibit No. 12.

(On the letterhead of Puget Sound Machinery Depot, dated at Seattle, April 7, 1919.)

T. W. Meckstroth, Agent,

N. P. Ry. Co.,

Seattle, Washington.

Dear Sir:

We are returning enclosed herewith, your Expense Bill, dated April 5th, Number 0680, covering charges on carload of Forgings, PRR Car. #294476.

We are entitled to a rate of \$1.37½ per 100 Lbs. on this Car in accordance with Item 3540, Page 296, Tariff 40, as this car contains Forgings and not finished shafting. The Shafting is still in the rough state and must be finished in our Shop here.

Kindly correct the charges on this car, and oblige

Yours very truly,

PUGET SOUND MACHINERY DEPOT.

(Signed) GEO. B. GEMMILL,

Asst. Secretary.

GBG—L.

Mr. WINDERS.—I think, showing their own construction of the proper classification of this ma-

(Testimony of T. W. Meckstroth.)

terial, I will offer in evidence a further letter of the Puget Sound Machinery Depot (showing).

Mr. BRONSON.—I do not think that ought to be admitted in evidence. I do not think anything in the way of a suggestion of compromise or anything of that kind is competent at all.

Mr. WINDERS.—What we propose to show is this, that at [53—32] the time Mr. Meckstroth and Mr. Walker talked to Mr. Campbell and again presented these bills, the new and subsequent tariff had been filed, that under that tariff it was proper that if the tariff charges which had accrued were paid in the manner provided by the act the Commission might have afforded some relief, and that they were requested to pay the tariff rates and then file their application, and that in response thereto they expressed their willingness by this letter, not to pay the tariff rates which were in effect at the time this shipment moved, but to pay a tariff rate which was subsequently put into effect under a similar classification for which we are now contending. The only purpose of that is not to show a compromise, but to show that they themselves knew that these shipments could not be classified either as rough forgings or plain shafting, as they are now contending.

The COURT.—The objection is sustained, as it appears to be principally in the nature of a compromise.

Mr. WINDERS.—I will withdraw the offer then, your Honor.

(Testimony of T. W. Meckstroth.)

The COURT.—It is your contention, Mr. Winders, that this turns on the meanings of the expression “Not otherwise finished.”

Mr. WINDERS.—“N. O. S.” means not otherwise specified, that is under Item 3540.

The COURT.—That item contains the expression “Forgings not otherwise finished,” whether that means steps taken towards other finishing, or whether it means finished finally. [54—33]

Mr. WINDERS.—Our contention is that rough forgings must be rough forging, and if there is any machine work done on them that they must be under the other classification.

The COURT.—And then it is your contention that finished means finished, Mr. Bronson; the dispute narrows down to that?

Mr. BRONSON.—Our contention is that finished means finished, and the evidence we will offer to the Court will be that this process of rough turning is not a finishing process for that purpose at all. It is to determine whether there are any cracks or imperfections.

The COURT.—The plaintiff's contention is that there is no further finishing done—now, I am talking about Item 3540, about these bolt holes—not further finished than being drilled with bolt holes. The question I have in mind is whether or not further finished than being drilled with bolt holes means nothing more done towards finishing, or whether it means not entirely finished in some other way.

(Testimony of T. W. Meckstroth.)

Mr. WINDERS.—Of course, with reference to the classification under 4, 7 and 9, according to Mr. Cade's testimony, it comes under the head of No. 9.

The COURT.—“Shafts or shafting, iron or steel”—do both sides agree that cams, couplings or fittings refers to separate contrivances to go on the shafts? “9. Not key-leaved nor key seated”—no one contends that they are key-leaved or key-seated?

Mr. BRONSON.—No. [55—34]

Mr. WINDERS.—Our contention is that this shafting was flanged and was roughly machined, turned down.

Mr. BRONSON.—Do you contend that the flange has anything to do with it?

The COURT.—Could there be such a thing as a line shaft without a flange?

Mr. WINDERS.—It takes it out of the plain shafting.

The COURT.—Is there any such a thing as a line shaft without a flange?

The WITNESS CADE.—Yes, there is. Practically all of the plain shafting moving from eastern territory to the Coast, or *vice versa*, under the term shafting is the plain cylindrical-shaped bars drawn through a die or turned on a lathe and polished—most of them drawn through steel dies, which is used for line shafting of all types of manufacturing plants.

The COURT.—How are they joined together?

The WITNESS.—They are joined together in a

(Testimony of T. W. Meckstroth.)

straight line by what they call couplings; it has a collar effect that seats over it, and is key-seated and bolted into the shaft proper, and then brought together.

The COURT.—In the one the bolts are used in the flange and in the other this is key-seated in the shaft and seated in the couplings?

The WITNESS.—In the other the coupling is also joined by bolts. It is first fastened to each end of the independent straight shaft and then they are brought together and coupled by bolts. And as that shaft revolves, they must be so fastened that there will not [56—35] be a slip, and that is the reason for the key. The straight plain shafting will pack very closely, whereas if you have a flange, shoulder and flange, you have spaces, according to the width of the flange, between the pieces.

Mr. WINDERS.—The plaintiff rests.

The COURT.—Is there any evidence for the defense?

Mr. BRONSON.—Counsel will admit that where there are two rates applicable to any one commodity, that the shipper is entitled to the lower rate.

Mr. WINDERS.—Yes.

Here the plaintiff rests. [57—36]

Testimony of George B. Gemmill, for Defendant.

GEORGE B. GEMMILL, produced as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Q. (Mr. BRONSON.) State your full name.

A. George B. Gemmill.

(Testimony of George B. Gemmill.)

Q. What is your business or association?

A. Assistant secretary of the Puget Sound Machinery Depot.

Q. And how long have you been with the Puget Sound Machinery Depot? A. Sixteen years.

Q. What period of that time have you been familiar with machinery or shafting such as in this case?

A. About twelve years, since we have had our shops.

Q. The Puget Sound Machinery Depot operates machine shops? A. Yes.

Q. And installs shafting and handles it in all parts?

A. We do not install it in the boats, but we finish it complete in our shop for installation in the boats.

Q. Are you familiar with the purchases and shipment of shafting? A. Yes.

Q. State whether or not your dealings in it are extensive in character, or otherwise? A. Yes.

Q. How extensive are your dealings with this type of material?

A. One of my duties is the purchasing of all material that arrives from the East, and material of this nature I order in accordance with the specifications and blue-prints submitted to me by our engineering department, so that my order when it goes to the factory will have all of the [58—37] specifications and necessary information.

Q. State whether or not the dealings of the Puget Sound Machinery Depot in which you are concerned

(Testimony of George B. Gemmill.)

are extensive in character, whether they run into large amounts, such as carloads. A. They do.

Q. Can you give an idea of how much?

A. Well, we were receiving several hundred carloads a year at that time for our machine shop.

Q. And you have been personally familiar with those transactions? A. Yes.

Q. And you are familiar with the use and construction and so forth of machinery in connection with the shafting? A. Yes, sir.

Q. I will ask you with reference to Plaintiff's Exhibit No. 1, whether this is a blue-print prepared either by you or for you in connection with the shipment concerned in this case? A. Yes.

Q. Describe on this Exhibit No. 1 the illustration of the material or the shafting which is under discussion here.

The COURT.—The other witness referred to Circles 1, 2 and 3.

A. This is a drawing of the finished shaft as we would deliver it to our customer. We ordered the shafting from the Camden Forge Company, rough turned to within $\frac{1}{8}$ inch of the finished size. That is, after we received the shafting we had to take off $\frac{1}{8}$ inch all over, or $\frac{1}{4}$ of an inch in diameter of the shafting and the couplings— [59—38] those flanges.

Q. In what way, if any, do those No. 1, 2 and 3 drawings on this Exhibit No. 1, differ from the shaft as it was shipped?

A. These drawings No. 1, 2 and 3 show the shaft-

(Testimony of George B. Gemmill.)

ing finished down to the finished sizes, with the bolt holes in the flanges drilled, while we brought the shafting out in a rough turned state.

Q. None of the other illustrations on here have anything to do with the shafting.

Mr. WINDERS.—We admit that all that was done with the shafting was that it was rough turned down to within $\frac{1}{8}$ inch of the final finish with the flanges on, and that it was not key-leaved or drilled or anything of the kind—we have not contended anything to the contrary.

A. This Exhibit No. 2 shows the shaft on the top of the drawing, not numbered, shows another shaft which is commonly known as the tail shaft; it has a flange on one end and the other end is tapered to take the propeller of the ship.

Now, this shaft is brought out in the rough state, rough turned to within $\frac{1}{8}$ inch of the finished diameter, and we finish it here.

Q. You mean a quarter of an inch of the finished diameter?

A. Yes; a quarter inch in diameter and $\frac{1}{8}$ inch all over.

Mr. WINDERS.—We will admit that that was true of all of them.

Q. (Mr. BRONSON.) And nothing more was done—none of this finished work?

A. No; not threaded, and the taper was not on. That would [60—39] be forged straight, and we would have to machine it all here.

(Testimony of George B. Gemmill.)

Exhibit No. 3 shows the shaft as it is finished or installed in the boat. There is the complete shaft from the propeller end up to the thrust shaft that connects with the engine. That is the complete shaft as it is installed in the boat, and these show the flanges that connect the different sections of shafts.

Q. What is the purpose of this rough turning; what do you call that, technically?

A. While we specify the shafts rough turned, the process in the forge shop is commonly known as hogging the shaft. In other words, the lathe on which this shaft is rough turned is called the hogging lathe. It is not a lathe which you would finish a piece of shaft in. It would not be true enough to turn a shaft to finished dimensions, because they take a very heavy cut when they are rough turning it, and it is called a hogging lathe, and in the forge shop they refer to the rough turning process as hogging the shaft—taking the rough surface off.

Q. What is the purpose of it?

A. We buy the shafting from the forge shop in the East rough turned so that the forge people will be satisfied that the shaft is not defective and is forged true to size before it is shipped out here. Because if it was shipped out here in the rough and we took the first scale off by the rough turning process and the forging developed any cracks, or was not forged true to size, that is if it was out of round,

(Testimony of George B. Gemmill.)

it would be rejected and they would have to replace the material F. O. B. Seattle. [61—40]

It is not the saving in the purchase price that the shaft is ordered rough turned for; it is to be sure that you will get shafting that is not defective, because when the shafting comes from under the hammer it has got a heavy scale on it and it is in the rough state and from the appearance of it you cannot tell whether there is a defect in the way of a crack or a flaw until it is put in the hogging lathe and the first scale taken off.

Q. What will that disclose, in taking off that outside scale?

A. The forge people can determine immediately if the shaft is true to size and if there are any defects. If there are any defects they will show up by the time you get it within $\frac{1}{8}$ inch of the finished size.

Q. And is that the only way of determining whether there are defects?

A. That is the only way.

Q. There were no connections on any of this shafting, of any kind? A. No connections.

Q. Were there any preparations made for any connections, except just as it was forged?

A. Just as it was forged.

Q. No bolt holes, no key-seating or any devices of any kind or character? A. No, sir.

Q. In your opinion, Mr. Gemmill, as a machinery man, state to the Court whether or not the shafting which is under discussion here comes within the

(Testimony of George B. Gemmill.)

definition in this Westbound Freight Tariff 4-O, page 296, Item No. 3540, specifying "Forgings, N. O. S., not further finished than being [62—41] drilled with bolt holes?"

A. I believe that it does.

Q. What is your opinion as to whether or not it comes within the definition contained on page 293 of the same book under "Shafting, plain," with the note below "Carload rates apply only on plain shafting without connections"?

A. That rate can also be applied.

Q. Is it a forging? A. It is.

Q. Is it shafting? A. It is.

Q. And are those definitions within trade which you are familiar with?

A. Yes. A forged shafting can be called even in the rough state before it is put in the lathe to have the first scale taken off, what they call the hogging process, before it is put in the machine at all, the rough forging is referred to as a shaft as well as a forging.

Q. Is this shafting within the definition on page 296 of tariff 4-O, finished in any particular whatsoever?

Mr. WINDERS.—He has testified as to the condition of this shafting, and "Not otherwise finished" is plain English.

The COURT.—I understand, the case is tried to the Court—and where you have experts, I understand that the experts are not only witnesses but

(Testimony of George B. Gemmill.)

they are advocates and they argue a case, and so I will overrule the objection.

Mr. BRONSON.—This is also in answer to Mr. Cade's definition. [63—42]

The WITNESS.—It is not finished.

The COURT.—By that I understand you to mean that it is not further finished?

The WITNESS.—Well, it is not what we call a finishing process at all.

Q. (Mr. BRONSON.) In other words, as I understand you, it was a testing process—to test its condition?

A. Yes. It is hogged or rough turned in the forge shop to determine whether the shaft is defective or not, and the lathe they put that shaft on they could not finish it on that lathe.

Q. Now, Mr. Gemmill, you have heard the testimony here of Mr. Cade with reference to West-bound Tariff 4-P.

A. 4-P is when the change took effect. I could not locate that.

Q. In the volume I have here, page 313, Item 2142, is specified shafts, line; shafts, propeller; shafts, tails; shafts, thrust. Now, in the trade and in the business of shipping shafting and so forth, is there any distinction made there between line shafting, as to whether or not it has flanges on it?

Mr. WINDERS.—I do not see any provision in the tariff subsequent to the shipment has anything to do with the case, and that tariff which you are reading is subsequent.

(Testimony of George B. Gemmill.)

Q. (Mr. BRONSON.) I will ask you, may shafting be properly termed a line shaft whether it has flanges on it or whether it has no flanges on it?

A. Well, a plain bar of shafting, for instance, three inches in diameter and twenty-four feet long, you put it in the [64—43] shop and you connect it up with another piece of shafting with proper couplings or flanges, shaft couplings which are separate pieces, and drive some machines, why, it is referred to as a line shafting.

Q. You do not get my question—whether or not the shafting with the flanges forged on originally as an integral part of the shaft is also termed line shaft? A. Yes, it is.

(Witness excused. Whereupon a recess is taken until 2:00 o'clock P. M.)

AFTERNOON SESSION, 2:00 o'clock; continuation of proceedings pursuant to recess; all parties present as at former hearing.

Testimony of W. Scott Matheson, for Defendant.

W. SCOTT MATHESON, produced as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Q. (Mr. BRONSON.) State your full name.

A. W. Scott Matheson.

Q. What is your business?

A. I am vice-president and manager of the Bacon & Matheson Forge Company. We manufacture forgings and iron and steel products.

Q. Do you ship from the East raw material?

(Testimony of W. Scott Matheson.)

A. We do.

Q. How long have you been engaged in that business? A. Directly, 17 years.

Q. Part of that time with the Seattle Construction & Dry Dock Company?

A. Yes, 6 years. [65—44]

Q. Are you familiar with all of the mechanical methods and materials that go into that business?

A. Fairly so.

Q. You have had practical experience?

A. Yes.

Q. Without duplicating this record, I would like to have you look at the tariff—those are introduced in evidence?

Mr. WINDERS.—Yes.

Q. I will ask you to examine Exhibit No. 1 offered by the plaintiff here, and more particularly with reference to the items designated 1, 2 and 3, and state whether or not you understand what those are and what they represent. A. Thoroughly.

Q. Those are pieces of shafting?

A. Line shafting for a steamer.

Q. Now, assuming that those pieces were shipped out here from Camden, New Jersey, being part of four carload lots; that they were not bored for the bolt holes; that they were only hog finished down to about $\frac{1}{8}$ inch, and so forth, and considering all of those facts, I will ask you whether or not they come within the definition in Plaintiff's Exhibit No. 6, at page 296, under the head of Item 3540, "Forging

(Testimony of W. Scott Matheson.)

N. O. S., not further finished than being drilled with bolt holes"—whether they come within that.

Mr. WINDERS.—I object to that on the ground that this witness has not shown himself qualified to answer that question.

Mr. BRONSON.—He is more of an expert than your witness Cade was. [66—45]

The COURT.—I will overrule the objection and we will see how much of an argument he can make for his construction of this.

Q. Are these forgings within such a description as that, Mr. Matheson?

A. Yes, I would say so, that they were.

Q. I will ask you whether or not they would come within the description here on page 293 of the same exhibit, "Shafting, plain," having reference to Note 1, which reads as follows: "Carload rates apply only on plain shafting without connections"; in other words, are they plain shafting and without connections?

A. Yes, that is their description.

Q. Now, Mr. Matheson, you are familiar with the manufacture of these forgings; I will ask you what is the process in the manufacture of forgings; just briefly as you can, describe them.

Mr. WINDERS.—The specifications are in evidence—the specifications show what was done with those forgings.

The COURT.—I do not think he need describe all of the processes.

(Testimony of W. Scott Matheson.)

Mr. BRONSON.—I only want to go to one thing, and that is with reference to the hog machining; that is what I am coming to, and it will only take two minutes.

The COURT.—You may ask the direct question about that. I do not suppose there is any dispute about that.

Mr. WINDERS.—There is no dispute that these shafts were in the condition called for by these specifications.

The COURT.—I understand your position is, whether you call it hog finish or any other name, that when they [67—46] are partly dressed or lathed—

Mr. WINDERS.—They become shafting.

The COURT.—Whether they are hogged or any other kind of lathing that then they are—

Mr. WINDERS.—Shafting.

The COURT.—(Continuing.) —they are further finished.

Mr. BRONSON.—I want to ask this question, just so as to shorten it up. Whether hog planing is a finishing process or for the purpose of finishing a material or whether it is for the purpose of determining its character.

A. The rough turning is done primarily to determine whether or not shafting is a perfect shaft, whether there are any defects show up.

Q. What percentage does it occupy, if any, of a finished shaft?

(Testimony of W. Scott Matheson.)

A. That would depend somewhat on the size of the shaft. You are speaking of these particular shafts, and the weights as given in the invoices there—I would say, roughly, from 2% to 4%—the hogging to the finished shaft.

Q. Now, I will ask you with reference to the drilling of bolt holes in the flanges on shafts of that kind, at what time in the process can the bolt holes be drilled?

Mr. WINDERS.—I object to that on the ground that it is immaterial; there is no contention made that there were any bolt holes.

Mr. BRONSON.—I want to call your Honor's attention in that connection to the language of the tariff provision: "Forgings N. O. S., not further finished than being drilled with bolt holes." I want to show to the Court that bolt holes cannot practically be [68—47] drilled in the flanges of the shaft like that until this hog finishing has been done in order to see what the shafting is.

The COURT.—The objection is overruled.

Mr. WINDERS.—I want to call your Honor's attention to this fact, that that provision is not confined to shafts. It has reference to all forgings. The mere fact that this particular kind of a forging could not have drilled holes in it before the finishing was done would not add to or take from the provision of the tariff.

The COURT.—It may be that I will hold with you on that eventually, but I will let counsel make his record on this.

(Testimony of W. Scott Matheson.)

The WITNESS.—The bolt holes would not be drilled until the shaft has been centrifugally turned. You can readily see that they might have the holes in such position with reference to the balance of the shafting that the shaft would not clean up when they came to machine it. So that the holes are never drilled until the centrifugal cut had been taken off the shaft; then the layer-out can lay out the bolt holes and see that they are properly placed in the material for the shaft to clean up according to the bolt holes.

Q. In other words, it is not practicable to drill the bolt holes until you know where the exact center of the shaft is to be? A. Yes.

Q. And you cannot tell that until this rough hog machining [69—48] has been done?

A. Yes; it would be impracticable to drill the holes first.

Q. In your opinion, is a forging such as has been described here, on which this rough hog machining has been done, a finished product in any particular whatever? A. No, sir, it is not finished.

Cross-examination.

Q. (Mr. WINDERS.) Mr. Matheson, what do you call those articles that are shown on these plans, and by the question that has been asked by Mr. Bronson; what are they—what would you call that?

A. They are a forging—rough turned forging.

Q. Well, what would you call them when they are finished?

A. When they were completely finished?

(Testimony of W. Scott Matheson.)

Q. Yes. A. They were shafting.

Q. Shafting or shafts? A. Shafts or shafting.

Q. Well, now, what are they, shafts or shafting?
Do you call them shafting?

A. Either word is used.

Q. What do you use in ordering these particular articles; do you order shafting or do you order shafts, and in what way are they referred to on the prints and one thing and another which you prepare? A. Well, it would be a shaft.

Q. A shaft—and all of these shafts as shown in evidence here are prepared according to blue-prints and specifications [70—49] which are furnished, are they not? A. Yes, sir.

Q. Now, there is such an article as plain shafting, as that term is understood in commercial business; is there not? A. Yes, sir.

Q. And stocks of plain shafting are carried by various dealers in that character of articles?

A. Yes.

Q. Do you carry plain shafting?

A. We do not.

Q. Who does carry plain shafting in Seattle, if anyone? A. Machinery houses carry it.

Q. And they have regular stock sizes, don't they?

A. Yes.

Q. And did you ever know of any commercial shafting carried in stock by machinery houses that was other than ordinary straight shafts?

A. No, I think not.

Q. If you want a shaft or shafting made with

(Testimony of W. Scott Matheson.)

flanges on the end or anything of that kind you have to order it made, don't you? A. Yes.

Q. The firm of Meese & Gottfried are pretty large dealers in this class of material, are they not?

A. Yes.

Q. And I notice in their catalog covering transmission, elevator and conveying machinery, that they have listed here lists of turned and ground steel shafting of various lengths?

A. Yes. [71—50]

Mr. BRONSON.—That is going outside of the cross-examination; I did not ask him anything about that.

Mr. WINDERS.—You asked the definition of plain shafting.

THE COURT.—The objection is overruled.

Q. The various shafting in this catalog, and I take it in other catalogs, that is generally kept in stock and on hand is usually as shown in this straight shafting?

A. Yes.

Q. And then they have collars to connect this shafting, and flanges that they bolt on to the end of the shafting?

A. Yes.

Q. And it is this straight shafting and these collars and separate flanges which you would ordinarily find in stock? A. Yes.

Mr. WINDERS.—I think I will offer this catalog in evidence.

(Testimony of W. Scott Matheson.)

Mr. BRONSON.—I do not think that counsel can offer exhibits in evidence on cross-examination of my witnesses.

The COURT.—The objection will be overruled. Are you offering the whole book?

Mr. WINDERS.—I am offering such portions of that book as catalog commercial shafting and the couplings thereon, in explanation and in line with the cross-examination of this witness as to what is plain commercial shafting.

The COURT.—It will be admitted. Exception noted for the defendant. [72—51]

(Marked "Plaintiff's Exhibit No. 13.") I think you should take the time later to fill in this record by pointing out the pages.

Mr. WINDERS.—I will give the pages now: Being on pages 64, 65, 66, 67, 68, 69 and 70 of the catalog of Meese & Gottfried Company.

Q. Mr. Matheson, referring now to the specifications which went forward with these prints; I notice the first specification is for a line shaft forging with coupling on each end, roughened 4' 6" long, Item 4, Dwg. #E-399. The next item, line shaft forging with coupling on each end, rough turned 4' 8 $\frac{1}{8}$ " long. The next item line shaft forging with coupling on each end, rough turned 4' 8 $\frac{3}{8}$ " long, Item 4, Dwg. #E-399.

Above shafts to be rough turned to within $\frac{1}{8}$ " to $\frac{3}{16}$ " of finished diameters. Flanged couplings to have $\frac{1}{8}$ " finish allowed all over.

(Testimony of W. Scott Matheson.)

In ordering a forging for the purpose of being used to make a line shaft you can and do order the forgings without any rough finish, don't you?

A. You could.

Q. And you do?

A. Yes, it is sometimes done.

Q. And when you order this rough finishing put upon these shafts, whether you call it hogging or whatever you may call it, there is a charge made for that?

A. There is.

Q. And if you order merely the rough forging done on the forging under these specifications which provide that any rejected forgings be replaced, if there were any defects [73—52] showed up in them when they came out here, the manufacturer would have to replace them? A. Yes.

Q. Now, referring to the next page "Tail shaft forgings rough turned to within $\frac{1}{8}$ inch to $\frac{3}{16}$ inch of finished diameters including taper and threaded ends, flanged coupling to have $\frac{1}{8}$ inch finish all over as per drawing"; what does that mean, Mr. Matheson?

A. The end of a tail shaft is tapered to receive the propeller.

Q. Does that mean the end must be turned down rough more than the rest of the article—what I understand is that that tail shaft—

A. (Interposing.) The end would be of smaller diameter than the main part.

(Testimony of W. Scott Matheson.)

Q. What I am getting at is, they must take this tail shaft and the coupling on the end of the flange, and they cut that down with $\frac{1}{8}$ of an inch to the final finish, and then it says also as to this tail end that they have to also point down this shafting, under this specification? A. Yes.

Q. So that at least as far as the pointing down the end of this shafting is concerned, there would not be any necessity of doing that for the purpose of discovering defects?

A. It is a further precaution.

Q. That end is tapered down more than the main body of the shaft will be when it is completed, is it not? A. Yes.

Q. So that that tapering down and the machine work done on the [74—53] other is of a great deal of assistance in the final finishing of these shafts, is it not—it saves a great deal of work?

A. It helps.

Q. And a charge is made for that by the factory?

A. Yes.

Q. Now it says “Line shaft forgings rough turned to within $\frac{1}{8}$ inch to $\frac{3}{16}$ inch of finished diameters; flanged couplings to have $\frac{1}{8}$ inch finish allowed all over.” What does that mean—flanged couplings to have $\frac{1}{8}$ inch finish allowed all over?

A. Well, that is the flange on the end of the shaft. There is $\frac{1}{8}$ inch material left all over.

Q. In other words, they were to leave $\frac{1}{8}$ of an inch for the purpose of being finished out here?

(Testimony of W. Scott Matheson.)

A. There is $\frac{1}{8}$ of an inch left on there all around.

Q. I don't understand myself just what you mean.

A. Suppose the shaft was finished and the size was to be 7 inches. The outside diameter would be $7\frac{1}{4}$ as rough turned. If it was 2 inches thick it would be left $2\frac{1}{4}$ inches thick, rough turned.

Q. And how about the flange?

A. That is the flange I am speaking of.

Q. In other words, they were not to finish the flange down to a point less than $\frac{1}{8}$ of an inch all around, so that it would be a quarter of an inch in diameter?

A. This is arbitrary. There is no proposition called for in that—it would be a $\frac{1}{8}$.

Q. They would have to follow the specifications?

A. Yes, but there is a variance there; in other words, they [75—54] could easily come within $\frac{1}{8}$ of an inch without any trouble, you see.

Q. Why would they specify here that they would want to leave $\frac{1}{8}$ of an inch on this flange and coupling?

A. Well, that is left for the purpose of giving the forge people a chance there to go one way or the other—a small margin. Shafts are usually finished to a micrometer size; if it is finished to the size of $7\frac{1}{8}$, they would not allow you to vary more than a few thousandths of an inch and that calls for skilled labor.

Q. (Mr. BRONSON.) You are referring now to the finished product by the forge work here?

(Testimony of W. Scott Matheson.)

A. Yes.

Q. (Mr. WINDERS.) I am asking him why—and I understood him to answer why, for instance, the Puget Sound Machinery people would want to specify that they must not get within $\frac{1}{8}$ inch of a final or total finish of these couplings on the end. Would that be because there might be a variance in the connection or something of that character?

A. No; that is the usual practice, to machine within $\frac{1}{8}$ of an inch.

Q. This says they can't go less than $\frac{1}{8}$ of an inch. What interest would the Puget Sound Machinery Depot have in stopping them from doing more work if they were willing to do it at the same price? They, apparently, restrict them to finishing these couplings or flanges to an extent that they must not get closer than $\frac{1}{8}$ of an inch.

A. Well, that is good practice. They could remove that $\frac{1}{8}$ finish as easily as they could a $\frac{1}{16}$. What I mean is that in taking the finishing cut the lathe will remove $\frac{1}{8}$ [76—55] as easily as $\frac{1}{16}$.

Q. They specify this for the purpose of the ultimate user? A. Yes.

Q. That they do not want that taken off at the factory?

A. Well, for rough turning they would not want it taken off there.

Q. It also says taper and threaded ends are to be turned—that is what you have been referring to?

A. Yes.

(Testimony of W. Scott Matheson.)

Q. Now, are these tail shafts threaded at the point of origin? Look at these specifications. Does that provide for the threading of the tail shafts at the point of origin? (Handing papers to witness.)

A. No. I would say that that cut is run right out including the threaded portion. They do not cut down for the threaded portion, which is of smaller diameter.

Q. In other words, they would run a taper?

A. Run a straight taper.

Q. It says "The above order is for an odd quantity of shafting, but one set consists of four line shaft forgings and one propeller shaft." Those various articles were all to be used in connection with shipbuilding, were they not?

A. I presume so.

Q. When it refers to flanged coupling, that means flanged on the end? A. Yes.

Q. And "Forged steel shafts rough turned to within $\frac{1}{8}$ inch of finished diameters including taper and small flange ends 24' $11\frac{7}{8}$ " Long $7\frac{1}{2}$ " Diameter with flange on one [77—56] end $8\frac{3}{4}$ " Diameter; other end tapered." Just look over the items. (Showing.) Does that mean that one end was tapered down and then the flange put on and the other end would be larger with another flange?

A. No. It is a flange on one end and the other end is taper.

Q. It says "Forged steel shafts * * * in-

(Testimony of W. Scott Matheson.)

cluding taper and small flange ends." What do you mean by small flange ends?

A. Well, the drawing, probably, would show, but I would say a small flange is—

Q. (Interposing.) That they were to turn the shaft proper, and they were to turn down the taper end?

A. Yes.

Q. And they were to turn the small flange end?

A. Yes.

Q. With flange on one end $8\frac{3}{4}$ " diameter and the other tapered?

A. Yes.

Q. That means just one flange?

A. One end is tapered and the other end is slightly larger than the main part of the shaft. The main part is $7\frac{1}{2}$ " and the flange end here is $8\frac{3}{4}$ ".

Q. On the other, No. 40, it says "Forged steel shafts rough turned to within $\frac{1}{8}$ " of finished diameter including taper and threaded ends"—it should be on each end?

A. Yes.

Q. Now, in that case, as they would come from the factory with this rough turning, they would have this rough turned smooth and straight until it would get to each end and then both ends would be rough turned down to a point within $\frac{1}{8}$ " of the final dimension? [78—57]

A. Yes.

Q. There are a great many different kinds of forgings?

A. Yes.

Q. And many of these forgings, which are not for propeller shafts, do have holes drilled in them?

A. Yes.

(Testimony of W. Scott Matheson.)

Q. In the rough? A. Yes.

Q. For wagon axles and purposes of that kind, that is correct? A. Yes.

Q. So that the statement that forgings had holes in them would not imply that it was necessary that any other work be done on the forgings other than to drill the holes? A. Shafting—

Q. I am not talking about shafting; I am talking about forging. I say, there is not anything in this tariff provision which you made reference to which says anything about shafts, is there

Mr. BRONSON.—That is not cross-examination. There may be a million things.

The COURT.—The objection is sustained.

Q. (Mr. WINDERS.) Now, it is not uncommon for forgings, without anything else being done to them, to have holes drilled in them?

A. No, sir, it is not.

Redirect Examination.

Q. (Mr. BRONSON.) But a forged shaft, to have holes drilled in it would have to have a flange? [79—58]

Mr. WINDERS.—I object to that as irrelevant and immaterial and on the further ground that the Western Classification that is introduced in evidence provides for shafts, some that have holes in them and some that do not. The only tariff provision that Mr. Bronson refers to is rough forgings and it does not say anything and it has not any classification with shafts or shafting.

(Testimony of W. Scott Matheson.)

The COURT.—The objection is sustained. It is already covered.

Q. (Mr. BRONSON.) Now, Mr. Matheson, will you examine pages 64 to 70 of Plaintiff's Exhibit No. 13, and state whether or not there is any relation there to shafting for vessels?

A. These are rolled shaftings; what they call cold rolled shafting—passed through rolls. They have not been forged at all.

Q. They have not been forged at all? A. No.

Q. They are for what purpose?

A. Line shafting and sawmills and—

Q. Are they in any way related to or used in ships?

A. No, sir, they do not use those in ships.

Q. Do those people handle any ship shafting of any kind?

A. I think not. I am quite sure they do not.

Q. This is in relation simply to shafting for mills and things of that kind? A. Yes.

Q. And the coupling in connection with it?

A. Yes.

Q. Mr. Matheson, I want to ask you a question that I overlooked [80—59] in direct examination, and I will ask you to wait until the Court rules.

I will ask you whether or not the shafting which has been described to you could be, in the parlance of the trade, defined as machinery?

Mr. WINDERS.—I object to that question upon two grounds; in the first place, the use of the word "shafting" is an assumption of something that is not

(Testimony of W. Scott Matheson.)

correct under the evidence in this case and under the specifications and under this witness' own testimony these are shafts and not shafting.

Mr. BRONSON.—Before the Court rules; I propose to offer in evidence a letter from one of the officers of this association defining it as shafting.

The COURT.—The objection is overruled. I understand that the witness is examining the specifications 1, 2 and 3.

Mr. WINDERS.—I object, on the ground that it is not within the scope of this witness' or any other witness' testimony to pass upon the method of classification in which any article may be put under the tariffs as approved by the Commission. Now, if the Commission wants to classify shafts as machinery, why that is a matter by which we are all concluded.

Mr. BRONSON.—I am not seeking to do that. I stated to counsel and the Court that I propose to offer a letter by which the plaintiff in this case claims that this is shafting or machinery.

The COURT.—I will overrule the objection. It is almost entirely a question of construction when you compare [81—60] these different matters in the tariff—I will allow the question to be answered.

Q. Is it machinery? A. It is not.

Q. It is not machinery? A. No.

Mr. BRONSON.—That is all.

Q. (Mr. WINDERS.) In other words, under your understanding of the definition of machinery

(Testimony of W. Scott Matheson.)

you would not consider a shaft any part of machinery, finished or otherwise?

A. A finished shaft would be a part of machinery.

(Witness excused.) [82—61]

**Testimony of George B. Gemmill, for Defendant
(Recalled).**

GEORGE B. GEMMILL, recalled on behalf of defendant, testifies as follows:

Q. (Mr. BRONSON.) I will ask you to examine Defendant's Exhibit A-1, which is attached to a letter to the Puget Sound Machinery Depot from Mr. F. F. Wittenberg, Chief Inspector, and state whether or not you received that letter (showing).

A. Yes, I did.

Mr. BRONSON.—I offer that letter in evidence.

Mr. WINDERS.—I have no objection.

Mr. BRONSON.—I will read the letter.

Mr. WINDERS.—I will put Mr. Cade on later to show what that means.

Mr. BRONSON.—This is a letter addressed by the United States Railroad Administration to Mr. Cade, as follows: (Reading.)

“SUBJECT: Rough Turned Forgings; Rates on.
Mr. A. B. Cade, Superintendent,

Weighing & Inspection Department,
Trans-Continental Freight Bureau,
Seattle, Wash.

Dear Sir:

Referring to your letter of June 20th, File S-64-207, concerning proper rates under Trans-Continental Tariffs on

(Testimony of George B. Gemmill.)

“Rough Turned Forgings, machined to within
1/8 or 1/16 of an inch of final dimensions.”

It is the opinion of this Committee, which is also concurred in by the San Francisco Committee, that such material is ‘Shafting or Machinery’ and should be rated accordingly.

“Yours truly,

“(Sgd.) F. W. ROBINSON,

“Chairman.”

JWM:BM [83—62]

Q. Now, Mr. Gemmill, in considering your experience and so forth, I will ask you whether or not this shafting which is the subject matter of this action, or the freight on which is the subject matter of the action, is machinery? A. It is not.

Mr. WINDERS.—The same objection goes to that, because it is not proper for this man or anyone else to question the right of the Commission to classify shafts and shafting other than plain shafting under the head of machinery, and if they desire to do it they can do it, and your tariff shows that they have done it, and so I think the question is immaterial. The tariffs are in evidence and the classification shows, that it is already in evidence, that shafts and shafting other than this plain shafting which is specifically set out, is classified under the general classification of machinery, just as pulleys are, and things of that kind.

The COURT.—The objection is overruled.

Q. Are you acquainted with this firm here of Meese & Gottfried Company? A. Yes, sir.

(Testimony of George B. Gemmill.)

Q. Do they handle any such shafting as is in controversy here at all? A. They do not.

Q. Does this catalog which has been identified here and offered in evidence as Plaintiff's Exhibit No. 13, relate to the shafting such as is in controversy in this case? A. No, sir.

Q. Will you look at pages 64 to 70, inclusive, and see if [84—63] that answer is correct as to those.

Mr. WINDERS.—I will admit that it does not.

The WITNESS.—No, it has no reference to this shafting at all.

Q. (Mr. BRONSON.) Mr. Gemmill, what is the character of the work done on these forgings in this hogging process, as compared with finishing?

Mr. WINDERS.—I object to that as repetition.

Q. As done by yourselves.

The COURT.—The objection is overruled.

A. As done by ourselves?

Q. Yes.

A. As compared to the hogging process?

Q. Yes.

A. When the shaft is hogged on the hogging lathe at the forge shop, the rough surface is taken off, and when we have that done we have the forge people hold to within from $1/8$ to $3/16$ of the finished size, because the lathes on which they hog this shaft are not what are known as finishing lathes. If they attempted to finish the shaft on those lathes it might not be true to size, and if they went any closer than from $1/8$ to $3/16$ they might

(Testimony of George B. Gemmill.)

be—they might have it turned to $3/16$ at one end and $1/8$ at the other, and the $1/8$ would not leave us sufficient metal to clean up the other end at our shop. For that reason we have them hold to within $1/8$ to $3/16$, and then we finish the shaft in our shop here. The finished dimensions must be within a few thousandths of an inch of the dimensions called for on the blue-print. In fact they are measured right down to micrometer dimensions. [85—64]

Q. I think I asked you this morning whether or not those shafts are finished in any sense when they are rough turned in this way.

A. They are not. They are simply hogged out to develop whether there is any defects or not.

Cross-examination.

Q. (Mr. WINDERS.) Do these specifications correctly name the articles which were ordered; in other words, you wanted forged steel shafts rough turned and forged steel shafts rough turned ring forgings, line shafts.

Now, when these articles are put on the boat, what are they called—line shafts and tail shafts and thrusts?

A. We did not receive any thrust shafts.

Q. Well, what are they called? What do you call those when the boat comes and orders from you, what does he call them?

A. Well, he might call it a line shaft or he might call it line shafting, or he might call it a propeller shaft, or he might call it a tail shaft.

(Testimony of George B. Gemmill.)

Q. I notice that you use the word “shafts” here in these specifications.

A. Well, the term “shafts” is used, or the term “shafting” is used.

Q. Did you ever hear of a man wanting a tail shafting—or do you call it a tail shafting?

A. He might order one piece of tail shafting or he might order two pieces of tail shafting, or he might order two pieces of line shafting.

Q. You ordinarily call them shafts, don’t you, and that is [86—65] the commonly accepted term?

A. Yes, they are referred to both as shafting and shafts.

Q. I did not ask you that. I asked you whether they were not ordinarily and commonly in the trade, by men handling them and by boat people, referred to as shafts.

A. Well, they are referred to as shafts.

Q. I said “ordinarily.”

A. Well, they are referred to ordinarily as both shafting and shafts.

Q. Do you say that a man who orders a crank shaft, that he might come in and say “I want a crank shafting”?

A. Well, we don’t get any crank shafts.

Q. I am asking you, sir—

Mr. BRONSON.—(Interposing.) If your Honor please, I object to that.

The COURT.—The objection is sustained.

Q. (Mr. WINDERS.) The fact is that, just as

(Testimony of George B. Gemmill.)

Mr. Matheson testified, as far as commercial shafting is concerned, or the ordinary shafting which you can buy on the market, it is such as is set forth in Meese & Gottfried's catalog, unless it is made to some special order?

A. Well, that is shafting used for one purpose, and this is shafting used for another purpose.

Q. You can't answer my question?

(Question repeated.)

A. Well, I can only answer that in one way, by saying that if a customer came in, we carry that same class of shafting—

Q. (Interposing.) You buy that in large quantities?

A. Yes, we buy it in carloads. We buy the other in carloads. [87—66] If a customer came in and ordered a piece of turned and polished shafting two inches in diameter, he might order one piece of shafting or he might order "one shaft,"—the same as line shafts. He might order one line shaft or he might order one piece of line shafting.

Q. Do you carry in stock these line shafts?

A. No, we do not.

Q. Does the manufacturer carry them in stock?

A. No.

Q. As a matter of fact, these shafts which you had made were all made in accordance with plans and specifications submitted? A. They were.

Q. And the shafting which you carry on hand for your ordinary trade is the ordinary straight

(Testimony of George B. Gemmill.)

shafting, such as is contained in that catalog, or of a similar character—Meese & Gottfried's?

A. Yes, sir, we carry that in stock.

Q. And if you want flanges or shafts or if you want them tapered down at the end, you had to put in a special order for that and have them made specially?

A. Well, the catalog pages which you referred to, all of those items are carried in stock, and if a party comes in—

Q. (Interposing.) I am asking you this question, sir, if a party were to come down to you or to any other house carrying ordinary shafting, and order a shaft with a flange drilled in it and made as a part of it, you would have to order that specially, would you not, and have it specially made?

A. No, they are carried in stock. [88—67]

Q. They are carried in stock with flanges made, a part of them?

A. The flange has to be fitted on to the shaft.

Q. I am not talking about where you fit them on, but I say when they are moulded into the shaft, an integral part of the shaft, and not attached by bolts or keys; but when you ask for a shaft and want the flange moulded in there, you have to order it especially, don't you?

Mr. BRONSON.—I will not object if counsel will concede my right to go into it on redirect examination, but he is not talking about ship shafting to this witness at all.

The COURT.—The objection is sustained.

(Testimony of George B. Gemmill.)

Mr. WINDERS.—On the ground that it has been covered by previous questions.

The COURT.—Well, I think it is covered.

Q. You have forgings for shafts sent out here without any work on them, don't you, in the rough?

A. No, we do not order forgings in the East sent out in the rough.

Q. You know that it is done by other concerns?

A. I don't know. The customary practice in ordering forgings in the East is to have them rough turned.

Q. They charge you for that rough turning, do they not?

A. They do; that charge is not over 2% or 3% of the cost of the shaft—it is less than—it is around a quarter of a cent a pound, or less.

The COURT.—Do I understand you to say that forgings are customarily turned to some extent?

The WITNESS.—It is customary when a manufacturer orders [89—68] forged shafts in the East to have them rough turned. In fact there are very few forge establishments which would want to enter an order on any other basis; because if the forging comes out here and a pipe or some other defect develops after it is turned then the forge shop has to replace the shafting F. O. B. Seattle, and when they take a rough ingot from the mill and start to forge that and machine it, very often the defects show up.

The COURT.—I understand that, but I simply ask you whether I understand your answer as being

(Testimony of George B. Gemmill.)

that forgings were customarily machined to some extent before they were shipped out.

The WITNESS.—Yes, sir; what is called—

The COURT.—There are forgings shipped out turned and machined?

The WITNESS.—I suppose there is.

Q. (Mr. WINDERS.) You heard Mr. Matheson say that he had done it and that it was done on this character of forgings, that some of them come out without any rough turning at all?

Mr. BRONSON.—I didn't understand him to say positively that any came out here.

Q. (Mr. WINDERS.) Now, you do get lots of forgings; just rough forgings for your other work, on which there is no machine work done at all?

A. Well, there is machine work done on any forging which you buy that is used in connection with machinery in any way.

Q. The forgings for the ends of the mast arms and so forth, do they have those machined in any way before they come out? [90—69]

A. I am not familiar with those forgings.

Q. It is not your intention to tell the Court that the great bulk of the forgings are worked on before they are shipped—that is taking the forgings as a whole?

A. Oh, no. There is a class of forgings that might come out with just a rough hole in them, and probably, the surface would not be machined at all. But any forging that comes out and is used as a part of some machine would have to be machined

(Testimony of George B. Gemmill.)

here. We operate a large machine shop, and we buy a lot of forgings, and I have never bought any forgings in the East that did not have to be machined, and in that case we always ordered them rough turned or hogged at the forge shop.

Q. You always do that, order them rough turned—all kinds of forgings?

A. Yes, I cannot recall of any that we brought out in the rough.

Q. But do you know, as a matter of fact, that there is a very large quantity of forgings which are brought out here in the rough?

A. I do not question that.

Q. On the Pacific Coast—and you do not question that there is a great many forgings in the rough that are sent out with holes in them?

A. I suppose there are.

The COURT.—These holes that are drilled in rough forgings; is it customary that they are drilled exactly so that they are the size of the holes which will be ultimately used in the machine? Or is it simply something that is finished up later? [91—70]

A. Well, there are, probably, some forgings where they would have holes in them when they come out, where it would not have to be accurate; that is, it would not make any difference whether it was $1/2$ or $1/16$ or $1/8$ or $1/4$ of an inch. But we would not think of having the factories drill holes in those shafts, because they would have to

(Testimony of George B. Gemmill.)

be exactly in accordance with our blue-print dimensions to a thousandth of an inch.

The COURT.—Yes; but in the shaftings as a rule, the holes which are put in the rough forging, would it be customary when you are finishing the machine to ream those holes out further, or are they left to be put in when forged or after the forging, before you get them, exactly—what is the custom there?

The WITNESS.—Well, there are forgings made where you would have the forge-shop punch a hole in some part of it while they had it in the heated process and they could punch the metal out, and then you could ream it or bore it out to size on arrival here.

The COURT.—I asked you if that is the customary method of doing it in the finished machine?

The WITNESS.—No.

The COURT.—Then, so far as putting holes, the firm that is forging or furnishing the forged articles would put them there so that nothing more would have to be done with the holes. Would that be the rule?

The WITNESS.—I beg pardon?

The COURT.—Would it be the rule that where the holes are put in the forged article before shipment that they would be put in in such a way that nothing more [92—71] would have to be done with the holes, or is it the rule that they would have to be machined ultimately?

The WITNESS.—It would have to be machined

(Testimony of George B. Gemmill.)

ultimately if the balance of that same forging had to be machined.

The COURT.—That is all.

Q. (Mr. BRONSON.) As a matter of fact, with reference to this shafting of this kind, would the holes ever be drilled back at the forge shop?

A. No, we, or any other manufacturer handling shafting of this kind, would never have the forge-shop drill the holes, because that is the last operation. The shaft is completely finished all over and then the holes are drilled, because you have to have the holes check up to all the other dimensions on the shaft to micrometer sizes—they cannot vary a fraction of an inch.

Q. Did I understand you to say in answer to Mr. Winders that no forging which is to become a part of the machinery leaves the forge shop until it has been machined in some way to a certain extent?

A. That is the general practice among manufacturers who order any quantity of shafts or gears or pinions or anything like that that are forged in the East. It is customary to have them rough-turned or hogged at the forge shop, to show up any defects that might be there.

We have bought pinion blanks and gear blanks and we have had those hogged and rough turned at the forge shop.

(Witness excused.)

Here the defendant rests. [93—72]

Testimony of A. C. Cade, for Plaintiff (In Rebuttal).

A. C. CADE, produced as a witness on behalf of plaintiff in rebuttal, testifies as follows:

Q. (Mr WINDERS.) Mr. Cade, who is the Mr. Robinson who wrote this letter to you—I see this letter is written by F. W. Robinson (showing)?

A. At the time this letter was written, Mr. Robinson was chairman of what was known as the Portland District Freight Committee, the committee working under the Administration, as the road at that time was under Administration control.

Q. And Mr. Wittenberg was in your department?

A. My chief inspector, located in the City of Seattle.

Q. You note the term “such material is ‘Shafting or Machinery’ and should be rated accordingly”? A. I do.

Q. How are those words “Shafting or Machinery” used in the classification?

A. The term “Shafting” or what we call plain shafting is covered under the line of iron and steel articles—

Mr. BRONSON.—I object to this as not proper rebuttal, because Mr. Cade has testified as to all the definitions and meanings of the tariff.

The WITNESS (Continuing.) —the commodity outline under the item provides for shafting, plain, under the caption iron and steel, articles of, and it is associated with such articles as bar iron, rod

(Testimony of A. C. Cade.)

iron and so forth, in a group which the commodity tariff will show for itself.

The term "Shafting" is also used in the machinery grouping both in commodity tariffs and Western Classification. In the group articles in the classification, [94—73] commodity tariff, it is customary to provide for all of the machinery and parts which are used in connection with certain types of machinery and shafting, as transmission machinery used in connection with pulleys which transfers and transmits power for the engine you might use to the machine which is operated by power, and it is considered, and generally considered by all that I have discussed the question with, as transmission machinery, and that is the reason why Mr. Robinson, or Mr. Robinson's office used the term that such material, having reference to these rough turned forgings, is ratable as shafting or machinery, because the term shafting is used in the group in the machinery item of the Trans-Continental Freight Bureau Tariff. In other words, you could put in—

Mr. BRONSON (Interposing.) I think the witness has gone beyond the question.

The COURT.—The objection is sustained.

Q. (Mr. WINDERS.) Mr. Cade, you have been in foundries—those big foundries in the east where forgings are made?

A. I have; —I have been in some of the smaller shops, not the very large shops.

Q. Are you familiar with and have you examined

(Testimony of A. C. Cade.)

in your business personally forgings moving from the Atlantic Seaboard to the coast, of various kinds? A. I have.

Q. Now, just tell the Court the character of forgings that do move in the rough without any finish.

Mr. BRONSON.—I object to that as not proper rebuttal. [95—74]

The COURT.—The objection is sustained.

Q. (Mr. WINDERS.) And have you in your work had considerable experience, and those working under you, in shipments of plain shafting and various shafts or shafting for boats?

A. I have.

Mr. BRONSON.—I object to that as not proper rebuttal.

The COURT.—The objection is sustained, unless you are leading up.

Mr. WINDERS.—I was going to ask this question:

Q. You heard Mr. Gemmill's testimony as to plain shafting which reads in this tariff in the commodity rates shown in this tariff on page 293—4-O, under the head "Iron and Steel, Articles of"; there are several heads "Bands, Bars, Bars, Corrugated or Twisted, Hoops, Rods, Shafting, Plain, and Slabs"; and under the head of Shafting, Plain, "See Note 1," where it says "Carload rates apply only on plain shafting without connections."

You, in your business of inspector of plain shafting, and in the inspection and making of rates on shafts such as used on boats, in all your experience

(Testimony of A. C. Cade.)

during all the years you have mentioned prior to the calling of this case for trial, did not know or hear of any classification ever made that put under this head of "plain shafting" such shafts as are referred to in these prints?

Mr. BRONSON.—I object to that.

Q. (Continuing.) Or of anyone contending prior to this trial or knew of any classification ever made or any request for any classification for shafts such as are shown on these drawings, to be placed under a classification of plain shafts, classified as iron and steel, articles of? [96—75]

Mr. BRONSON.—I object to that as not proper rebuttal, and the witness is not shown to be qualified to answer.

The COURT.—The objection is overruled.

The WITNESS.—In all of my experience in the inspection—

Mr. BRONSON.—I submit that question is susceptible of being answered "Yes" or "No."

The COURT.—That can be answered "Yes" or "No."

The WITNESS. (Continuing.)—I have never known of any such comparison being made.

Cross-examination.

Q. (Mr. BRONSON.) As a matter of fact, there had been no shipbuilding operations on this coast until this war took place, of any amount or character?

A. There is, in California territory there has

(Testimony of A. C. Cade.)

been considerable shipbuilding for many years past.

Q. Not up here where you have been familiar with—

A. Pardon me, but I was located in San Francisco twenty years. There has been very little in the north coast territory—there has been some.

Q. How long ago were you in San Francisco?

A. I was in San Francisco from the year 1889 up to the year 1909; since September 1909 I have been here.

Q. Were these classifications in force up to that time?

A. The classifications and commodity tariffs change.

Q. I am asking you whether or not these classifications here, or anything that can fairly be called approximating to them, were in force prior to that time? [97—76]

A. That is a very difficult question to answer.

Q. If you can't answer it, all right—how do they happen to put this new rate in?

A. In tariff 4-P?

Q. Yes.

A. At the request of the shipbuilding interests.
(Witness excused.)

The COURT.—Is there any further testimony?

(Whereupon the testimony is closed and the argument is set for Monday, January 15, 1923, at 2:00 P. M.) [98—77]

At the close of the testimony, and before the Court had entered its decision, the defendant tendered and requested the Court to make and find the following:

[Title of Court and Cause.]

Defendant's Proposed Findings of Fact.

The above-named defendant on this —— day of ——, 1923, requested the Court, in addition to the first findings of fact made by the Court, as requested by the plaintiff, and to which findings of fact the defendant assents to find:

II.

That on the 3d day of March, 1919, there was delivered to a connecting carrier, as operated by the then Director-General of Railroads at Camden, New Jersey, by the Camden Forge Company, one car, to wit, P. R. R. 294966, loaded with eighty forgings or flanged shafts for distribution from Camden, New Jersey, to the defendant at Seattle, Washington, and which car was, thereafter, duly transported and delivered by the predecessor in office of the plaintiff, as operating the Northern Pacific Railroad, to the defendant, on the 8th day of April, 1919, and that there accrued thereon, in accordance with the duly published classifications and tariffs, duly filed with the Interstate Commerce Commission of the United States, as provided by law, said shipment moving in Interstate Commerce, charges, including the war tax thereon, in the sum of One Thousand One Hundred and Seventy-five and 15/100

(\$1,175.15) Dollars, which charges were [99] duly paid by the defendant.

III.

The defendant further asks the Court to find that on the 10th day of March, 1919, there was delivered at Camden, New Jersey, by the same consignor, a second car loaded with twenty-one forgings or flanged shafts, loaded in car P. R. R. 294476 for transportation from Camden, New Jersey, to the defendant at Seattle, Washington, and that the said shipment was by the predecessor in office of the plaintiff, the then Director-General of Railroads operating the Northern Pacific Railway, delivered to the defendant at Seattle, Washington, on the 5th day of April, 1919; that under the classifications and tariffs duly filed with the Interstate Commerce Commission, as aforesaid, there accrued thereon freight charges, including the war tax thereon, in the sum of One Thousand Four Hundred and Two and 50/100 (\$1,402.50) Dollars, which charges were by the defendant paid.

IV.

That on the 22d day of March, 1919, a third car loaded with fifty-one forgings or flanged shafts was consigned from Camden, New Jersey, by the consignor to the defendant at Seattle, Washington, being car #N. Y. C., 347714, which car was transported from Camden, New Jersey, in regular course and delivered to the defendant at Seattle, Washington, on the 25th day of April, 1919, the same being transported and delivered by the United States Railway Administration as operating the

Northern Pacific Railway, and that there accrued on account of such transportation charges, including the war tax thereon, in the sum of One Thousand Six Hundred and Twenty-three and 88/100 (\$1,623.88) Dollars, which charges were paid by the defendant.

V.

That on the 9th day of April, 1919, there was delivered [100] to the then Director-General of Railroads, at Camden, New Jersey, a fourth car containing forgings or flanged shafts and other shafts of the same general character, being car B. & A. 10229, for transportation from Camden, New Jersey, to the defendant at Seattle, Washington, and which car was transported by the United States Railroad Administration operating the Northern Pacific Railway from Camden, New Jersey, to Seattle, Washington, and there delivered to the defendant, and that there accrued thereon freight charges, including the war tax thereon, in the sum of One Thousand Ninety-six and 70/100 (\$1,096.70) Dollars, which charges were paid by the defendant, and that all of the charges above set forth were paid by the defendant long prior to the bringing of this action.

VI.

That the charges above set forth in the findings proposed by the defendant were the proper and lawful charges of said transportation and for the whole thereof, and were in accordance with the tariff provided therefor by the Interstate Commerce Commission, and that no other or further or larger

charges could be lawfully assessed therefor, and that said shipments and each of them consisted of shaftings, plain without connections,* as classified in Transcontinental Freight Bureau, West-Bound Tariff No. 4-O, at page 293, being item No. 3450, filed as exhibit by the defendant in this case, the freight upon which should have been \$1.37½ per 100#, which was the amount paid by the defendant upon all of said shipments, which classification with the rate of \$1.37½ per 100# was in force and effect at the time when said shipments moved.

VII.

That the defendant has paid to the plaintiff the just amount of the freight rates imposed, as aforesaid. [101]

Each and all of which findings the Court refuses to make, and to which refusal the defendant excepts, and which execption is allowed.

Dated at Seattle, Washington, this 30th day of January, 1923.

EDWARD E. CUSHMAN,
Judge.

Filed January 30, 1923. [102]

[Title of Court and Cause.]

Defendant's Proposed Conclusions of Law.

The defendant requests that the Court, in accordance with the findings of fact proposed to find as a conclusion of law that the plaintiff is not entitled to any relief whatsoever in this action, and

that the defendant is entitled to be dismissed without day and to recover its costs herein.

Which conclusion of law the Court refuses to make, and to which refusal the defendant excepts and which exception is allowed.

Dated at Seattle, Washington, January 30th, 1923.

EDWARD E. CUSHMAN,
Judge.

Filed January 30, 1923. [103]

[Title of Court and Cause.]

Defendant's Proposed Judgment.

Whereupon the defendant requested the Court to enter judgment in favor of the defendant, dismissing this action with prejudice and with costs to the defendant, which motion the Court denies and to which defendant excepts and which exception is allowed.

Dated at Seattle, Washington, January 30, 1923.

EDWARD E. CUSHMAN,
Judge.

Filed January 30, 1923. [104]

[Title of Court and Cause.]

It is hereby ordered that the time for filing proposed bill of exceptions in the above-entitled case is hereby extended to the 1st day of March, 1923.

Dated at Seattle, Washington, this 9th day of February, 1923.

EDWARD E. CUSHMAN,
Judge.

O. K.—C. H. WINDERS.

Filed Feb. 9, 1923.

Hereunto annexed are the findings of fact, conclusions of law and judgment which were duly signed and entered by the Court on the 19th day of March, 1923, together with the exceptions to said findings of fact, conclusions of law and judgment by the defendant and plaintiff in error which were duly allowed by the Court, together with all the exhibits mentioned in the foregoing transcript of the testimony offered and received upon the trial, and the said findings of fact, conclusions of law and judgment, and defendant's exceptions to said findings of fact, conclusions of law and judgment as allowed and entered, together with the said exhibits, are hereby, by reference thereto, made a part of this bill of exceptions, which is signed, settled and allowed by me.

Dated this 19th day of March, 1923.

EDWARD E. CUSHMAN,
Judge. [105]

Due service of a copy hereof admitted this 27th day of February, 1923.

GEO. T. REID,
& C. H. WINDERS,
Attorneys for Plaintiff.

[Indorsed]: Lodged in the United States District Court, Western District of Washington, North-

ern Division. Feb. 27, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 19, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [106]

[Title of Court and Cause.]

Petition for Order Allowing Writ of Error.

The said defendant, Puget Sound Machinery Depot, a corporation, feeling itself aggrieved by the judgment entered in said cause, on January 30th, 1923, in favor of said plaintiff and against said defendant, for Four Thousand Eight Hundred Sixty-one & 69/100 Dollars (\$4,861.69), and plaintiff's costs and disbursements, and in which judgment and the proceedings leading up to the same, certain errors were committed to the prejudice of this defendant, which more fully appears from the assignment of errors filed herewith, comes now and prays said Court for an order allowing the defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that the Court in said order fix the amount of security which the defendant shall give for the plaintiff's costs under a prosecution of said writ of error, and further, that a transcript of the record,

proceedings and papers in this cause duly authenticated may be sent to said Circuit Court of Appeals.

Dated this 26th day of Aril, 1923.

BRONSON, ROBINSON & JONES,

Attorneys for Defendant. [107]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 22, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [108]

[Title of Court and Cause.]

Assignment of Errors.

Now comes the defendant, Puget Sound Machinery Depot, a corporation, by its attorneys, Bronson, Robinson & Jones, and in connection with its petition for a writ of error makes the following assignment of errors which it avers occurred upon the trial of the cause, to wit:

I.

The Court erred in finding that, as to the shipment of March 3d, 1919, there accrued thereon charges in the sum of Two Thousand Twenty-eight Dollars and Thirty-five Cents (\$2,028.35), plus a war tax in the sum of Twenty-five Dollars and Sixty Cents (\$25.60) or any sum in excess of One Thousand One Hundred Seventy-five Dollars and Fifteen Cents (\$1,175.15); and in refusing to find as to said shipment of March 3d, 1919, that there accrued thereon the sum of One Thousand One Hundred Seventy-five Dollars and Fifteen Cents

(\$1,175.15) including the war tax applicable to such shipment, which sum was duly paid by the defendant.

II.

The Court erred in finding, as to the shipment of March 10th, 1919, that there accrued thereon freight charges in the sum of Two Thousand Four Hundred Twenty-two Dollars and Fifty Cents (\$2,422.50), plus war tax in the sum of Thirty Dollars and Sixty Cents (\$30.60), or [109] any sum in excess of the sum of One Thousand Four Hundred Twenty-two Dollars and Fifty Cents (\$1,422.50) which included the war taxes properly applicable thereto; and in refusing to find as to said shipment of March 10th, 1919, that there accrued thereon freight charges including the war tax thereon, in the sum of One Thousand Four Hundred Two Dollars and Fifty Cents (\$1,402.50), which charges were by the defendant duly paid.

III.

The Court erred in finding, as to the shipment of March 22d, 1919, that there accrued thereon freight charges in the sum of Two Thousand Eight Hundred Four Dollars and Eighty-eight Cents (\$2,804.88), plus war tax in the sum of Thirty-five Dollars and Forty-three Cents (\$35.43), or any sum in excess of One Thousand Six Hundred Twenty-three Dollars and Eighty-eight Cents (\$1,623.88) including the war taxes properly applicable thereto; and in refusing to find as to said shipment of the 22d day of March, 1919, that there accrued thereon, on account of transportation

charges, including the war tax thereon, the sum of One Thousand Six Hundred Twenty-three Dollars and Eighty-eight Cents (\$1,623.88), which charges were paid by the defendant.

IV.

The Court erred in finding as to the shipment of the 9th day of April, 1919, that there accrued thereon freight charges in the sum of One Thousand Eight Hundred Ninety-four Dollars and Thirty Cents (\$1,894.30), with war tax in the sum of Twenty-three Dollars and Ninety-three Cents (\$23.93), or in any other sum in excess of One Thousand Ninety-six Dollars and Seventy Cents (\$1,096.70), which said last mentioned sum included the war taxes properly applicable to said charges; and in refusing to find as to said shipment of April 9th, 1919, that there accrued thereon, freight charges, including the war taxes thereon, in the sum of One Thousand Ninety-six Dollars and Seventy Cents (\$1,096.70), which charges were paid by the defendant, [110] and that all of the sums referred to hereinabove, which the Court refused to find as the proper sums accruing on each particular shipment, were paid by the defendant long prior to the bringing of this action.

V.

The Court erred in finding that the sums designated as charges, which were by it found to have accrued respectively on said above-mentioned shipments, and covering the transportation of the four cars in which the said shipments were laden, were

assessed in accordance with the duly filed and published classifications and tariffs governing the transportation of each of said cars from Camden, New Jersey, to Seattle, Washington, as shown by the tariffs and classifications as duly filed with the Interstate Commerce Commission, and then in effect; and the Court further erred in finding that said shipment consisted of flanged shafts roughly machine turned, properly classified as shafts or shafting, iron or steel, other than crank shafts, without cams, couplings or fittings, and not key-leaved or key-seated, as shown by the items four, seven and nine, page 301 of Western Classification No. 55; and the Court further erred in finding that said shafts were covered by Transcontinental Freight Bureau West-Bound Tariff No. 4-0, I. C. C. No. 1049, of R. H. Countiss, Agent, with supplements thereto; and the Court further erred in finding that said shipments were covered by the fifth class rate as designated in said classification; and further erred in finding that said classification which applied to said shipment was Two Dollars and Thirty-seven and one-half Cents (\$2.37½) per hundred pounds; and further erred in finding that said classification made by the Transcontinental Freight Bureau was a correct classification.

VI.

The Court further erred in refusing to find that the charges of Eleven Hundred Seventy-five Dollars and Fifteen Cents (\$1175.15), [111] Fourteen Hundred Twenty-two Dollars and Fifty Cents (\$1422.50), Sixteen Hundred Twenty-three and

Eighty-eight Cents (\$1623.88), and One Thousand Ninety-six Dollars and Seventy Cents (\$1,096.70), as applicable to the shipments of March 3d, March 10th, March 22d, and April 9th, 1919, respectively, were the proper and lawful charges of said transportation, and for the whole thereof, and were in accordance with the tariff provided therefor by the Interstate Commerce Commission, and that no other or further or larger charges could be lawfully assessed therefor, and that such shipments and each of them consisted of shaftings, plain without connections, as classified in Transcontinental Freight Bureau West-Bound Tariff No. 4-O, at page 293, being item No. 3450, filed as exhibit by the defendant in this case, and that the freight upon said shipment should have been at the rate of One Dollar and Thirty-seven and One-half Cents (\$1.371½) per one hundred pounds, which was the amount paid by the defendant upon all of said shipments, and that said classification with the rate of One Dollar Thirty-seven and One-half Cents (\$1.371½) per one hundred pounds, was in force and effect at the time when said shipments moved.

VII.

The Court erred in finding that there was due and owing to the plaintiff from the defendant the sum of Three Thousand Nine Hundred Sixty-seven Dollars and Thirty-six Cents (\$3,967.36), with interest on the portions thereof from the respective dates of the delivery of said shipments.

VIII.

The Court erred in refusing to find that defend-

ant had paid to the plaintiff prior to the institution of this action the full and just amount of the proper freight charges covering said four shipments.

IX.

The Court erred in making and entering conclusions or law to the effect that the plaintiff is entitled to a judgment against [112] the defendant in the sum of Three Thousand Nine Hundred Sixty-seven Dollars and Thirty-six Cents (\$3,967.36), with interest, or that the plaintiff is entitled to judgment in any sum of money whatsoever, and the Court further erred in concluding that the plaintiff is entitled to its costs and disbursements in this action.

X.

The Court erred in refusing to find as a conclusion of law from the findings of fact as proposed by the defendant that the plaintiff is not entitled to any relief whatsoever in this action, and that the defendant is entitled to be dismissed without day and to recover its costs herein.

XI.

The Court erred in finding and entering judgment in favor of the plaintiff and against the defendant in the sum of Four Thousand Eight Hundred Sixty-one Dollars and Sixty-nine Cents (\$4,861.69), together with his costs and disbursements herein.

XII.

That the Court further erred in denying defendant's motion for judgment in accordance with its

proposed findings of fact and conclusions of law in favor of the defendant, dismissing this action with prejudice and with costs to the defendant.

WHEREFORE, the defendant prays that the said judgment be reversed, and the District Court directed to dismiss the said action as prayed in the answer herein.

BRONSON, ROBINSON & JONES,

Attorneys for Defendant.

Received a copy of the foregoing assignments of error this 20th day of June, 1923.

C. H. WINDERS,

Attorney for Plaintiff. [113]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 22, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [114]

[Title of Court and Cause.]

**Order Granting Writ of Error, and Fixing
Amount of Bond.**

This cause coming on to be heard in the courtroom of said court in the city of Seattle, Washington, upon the petition of the defendant, Puget Sound Machinery Depot, a corporation, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors also filed in due time, and also praying that a transcript of the record duly authenticated may be sent to

said court in order that said alleged errors may be examined.

The Court having duly considered the same, does hereby allow the writ of error and grants the several prayers of said petition on the condition that the defendant furnish a good and sufficient surety bond, to secure plaintiff's costs in the sum of Two Hundred Fifty & no/100 Dollars (\$250.00).

Dated this 22d day of June, 1923.

EDWARD E. CUSHMAN,
Judge.

Received a copy of foregoing order this 20th day of June, 1923.

C. H. WINDERS,
Attorney for Plaintiff. [115]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 22, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [116]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, Puget Sound Machinery Depot, a corporation, as Principal, and the Southern Surety Company, a corporation of the State of Iowa, as Surety, are held and firmly bound unto the defendant in error, James C. Davis, Director-General of Railroads of the United States, and agent of the United States under the Transportation Act, 1920, providing for the termination of Federal control of Railroads, in the full and just sum of Two Hundred Fifty and no/100 Dollars (\$250.00) to be

paid to the said defendant, James C. Davis, etc., his certain attōrneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 25th day of June, in the year of our Lord one thousand nine hundred and twenty-three.

WHEREAS, lately at a District Court of the United States for the Western District of Washington, Northern Division, in a suit depending in said court, between James C. Davis, Director-General of Railroads of the United States, and Agent of the United States under the Transportation Act, 1920, providing for the termination of Federal Control of Railroads, plaintiff, and Puget Sound Machinery Depot, a Corporation, defendant, a judgment was rendered against the said Puget Sound Machinery Depot and the said Puget Sound Machinery Depot having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James C. Davis, etc., citing and [117] admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco in said Circuit Court on the — day of July, 1923.

NOW, the condition of the above obligation is such, that if the said Puget Sound Machinery Depot shall prosecute said writ of error to effect

and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

PUGET SOUND MACHINERY DEPOT,
[Corporate Seal] By GEO. B. GEMMILL,
Secy.

SOUTHERN SURETY COMPANY,
[Corporate Seal] M. REESE,
Attorney in Fact.

Sealed and delivered in presence of

J. L. MERRITT.

C. McWILLIAMS.

Approved this 28th day of June, 1923.

EDWARD E. CUSHMAN,
Judge.

Due service of a copy hereof admitted this 27th day of June, 1923.

GEO. T. REID and
C. H. WINDERS,
Attorneys for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 28, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [118]

[Title of Court and Cause.]

Stipulation Re Printing Transcript.

To avoid unnecessary repetition and expense, it is hereby stipulated that in printing transcript of record in the above-entitled cause there shall be

omitted from the pleadings, orders and other papers (other than the complaint, answer and judgment) the title of the court and the number and title of the cause.

Dated this 22d day of June, 1923.

C. H. WINDERS,

Attorney for Plaintiff.

BRONSON, ROBINSON & JONES,

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 22, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [119]

[Title of Court and Cause.]

Stipulation Re Original Exhibits.

It is hereby stipulated, subject to the order of the Court, that the clerk of this court, in making up his return to the writ of error herein, shall include herein and as a part thereof the originals instead of copies of the following matters heretofore attached to and by order of the Court made a part of the bill of exceptions;

Plaintiff's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
11, 12, 13, and

Defendant's Exhibit "A-1."

Dated this 22d day of June, 1923.

C. H. WINDERS,

Attorney for Plaintiff.

BRONSON, ROBINSON & JONES,

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 22, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [120]

[Title of Court and Cause.]

Order for Sending Up Original Exhibits.

Pursuant to written stipulation of the parties this day made and filed, and it being the opinion of the Court that such procedure is desirable and proper,

IT IS, THEREFORE, ORDERED that the clerk of this court shall, in making up his return to the writ of error in this cause, send to the United States Circuit Court of Appeals for the 9th District the original exhibits in said stipulation mentioned.

Done in open court this 22d day of June, 1923.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 22, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [121]

Order Extending Time to and Including August 15, 1923, to File Record and Docket Cause.

For good cause shown, it is hereby ordered that the time for filing transcript of record in the above-entitled action in the United States Circuit Court

of Appeals for the Ninth Circuit be and the same is hereby extended to the 15th day of August, 1923.

Done in open court this 28th day of July, 1923.

JEREMIAH NETERER,

Judge.

O. K.—C. H. WINDERS,

Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 28, 1923. F. M. Harshberger, Clerk. [122]

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

Will you very kindly prepare a transcript of record in the above-entitled cause, and forward the same to the Clerk of the United States Circuit Court of Appeals for the Ninth District, in due course, the said transcript to consist of the following papers.

1. Complaint.
2. Answer.
3. Plaintiff's Exhibits 1 to 13, inclusive.
4. Defendant's Exhibit "A-1."
5. Stipulation waiving jury trial.
6. Findings of fact and conclusions of law and
7. Judgment and exceptions thereto.
8. Defendant's proposed findings, conclusions and judgment.

9. Order extending time for proposed bill of exceptions.
10. Notice of application to have bill of exceptions certified.
11. Order settling bill of exceptions.
12. Bill of exceptions as settled.
13. Assignment of errors.
14. Petition and order allowing writ of error.
15. Writ of error.
16. Citation.
17. Stipulation as to printing matter.
18. Stipulation and order for sending up original exhibits.
19. Bond on writ of error.
20. This praecipe.

Dated this 28th day of June, 1923.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 28, 1923. F. M. Harshberger, Clerk. By, S. E. Leitch, Deputy. [123]

[Title of Court and Cause.]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 123, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges, incurred and paid in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the [124] above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 310 folios at 15¢	\$46.50
Certificate of Clerk to transcript of record, 4 folios at 15¢ .....	.60
Seal to said certificate .....	.20
Certificate of Clerk to original exhibits, 3 folios at 15¢ .....	.45
Seal to said certificates .....	.20

I hereby certify that the above costs for preparing and certifying record, amounting to \$47.95,

have been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 3d day of August, 1923.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [125]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. —.

JAMES C. DAVIS, Director-General of Railroads
of the United States, and Agent of the
United States Under the Transportation Act,
1920, Providing for the Termination of Federal Control of Railroads,

Plaintiff,

vs.

PUGET SOUND MACHINERY DEPOT, a Corporation,

Defendant.

Writ of Error. .

United States of America,—ss.

The President of the United States of America to
the Judges of the District Court of the United
States for the Western District of Washing-
ton, Northern Division, GREETING:

Because in the record and proceedings, as also
in the rendition of the judgment of the plea which
is in the said District Court before you, or some
of you, between James C. Davis, Director-General
of Railroads of the United States, and Agent of
the United States under the Transportation Act,
1920, providing for the termination of Federal
control of Railroads, plaintiff, and Puget Sound
Machinery Depot, a corporation, defendant, a mani-
fest error hath happened, to the great damage of
the said Puget Sound Machinery Depot, a corpora-
tion, as is, said and appears by the complaint, we
being willing that such error, if any hath been,
should be duly corrected and full and speedy jus-
tice done to the party aforesaid, in this behalf, do
command you, if any judgment be therein given,
that then, under your seal, distinctly and openly,
you send the record and proceedings aforesaid,
with all things concerning the same, to the Justice
of the United States Circuit Court of Appeals for
the Ninth Circuit, at the courtrooms of said court
in the city of San Francisco, in the State of Cali-
fornia, together with this writ, so [126] that you
have the same at the said place before the justice
aforesaid, within thirty days from date, that the

record and proceedings aforesaid being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 28th day of June, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States the one hundred and forty-seventh.

[Seal] F. M. HARSHBERGER,
Clerk of the said District Court of the United States, for the Western District of Washington.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,
United States District Judge, for the Western District of Washington. [127]

[Endorsed]: No. ——. In the District Court of the United States for the Western District of Washington, Northern Division. Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 28, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [127a]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. —.

JAMES C. DAVIS, Director-General of Railroads
of the United States, and Agent of the
United States Under the Transportation
Act, 1920, Providing for the Termination of
Federal Control of Railroads,

Plaintiff,

vs.

PUGET SOUND MACHINERY DEPOT, a Cor-
poration,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

To James C. Davis, Director-General of Railroads
of the United States, and Agent of the United
States under the Transportation Act, 1920,
providing for the termination of Federal con-
trol of Railroads, GREETING:

You are hereby cited and admonished to be and
appear at a term of the United States Circuit
Court of Appeals, for the Ninth Circuit, to be
holden in the city of San Francisco, State of Cali-
fornia, within thirty days from date, pursuant to
a writ of error filed in the clerk's office of the Dis-
trict Court of the United States, for the Western
District of Washington, Northern Division,

wherein you are defendant in error and Puget Sound Machinery Depot is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the 28th day of June, 1923.

[Seal] EDWARD E. CUSHMAN,

United States District Judge, for the Western District of Washington.

Attest: F. M. HARSHBERGER,

Clerk of said United States District Court for the Western District of Washington.

Due service of a copy hereof admitted this 28th day of June, 1923.

GEO. T. REID and

C. H. WINDERS,

Attorneys for Plaintiff. [128]

[Endorsed]: No. ——. In the District Court of the United States for the Western District of Washington, Northern Division. Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 28, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 4073. United States Circuit

[Endorsed]: No. 4073. United States Circuit Sound Machinery Depot, a Corporation, Plaintiff in Error, vs. James C. Davis, Director-General of Railroads of the United States, and Agent of the

United States, Under the Transportation Act, 1920, Providing for the Termination of Federal Control of Railroads, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed August 6, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PUGET SOUND MACHINERY DEPOT,
a Corporation,

Plaintiff in Error,

vs.

JAMES C. DAVIS, Director General of Railroads
of the United States, and Agent of the United
States, under the Transportation Act, 1920,
Providing for the Termination of Federal Control
of Railroads,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge.*

BRIEF OF DEFENDANT IN ERROR

GEO. T. REID and
C. H. WINDERS,

Attorneys for Defendant in Error

909 L. C. Smith Building
Seattle, Washington

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PUGET SOUND MACHINERY DEPOT,

a Corporation,

Plaintiff in Error,

vs.

JAMES C. DAVIS, Director General of Railroads
of the United States, and Agent of the United
States, under the Transportation Act, 1920,
Providing for the Termination of Federal Con-
trol of Railroads,

Defendant in Error.

STATEMENT OF THE CASE.

This action was brought by the Director General of Railroads to recover unpaid freight charges on four cars of flanged shafts shipped in March and April, 1919, from Camden, New Jersey, to the Plaintiff in Error for use in connection with shipbuilding operations carried on in Seattle. At the time of the shipment and at the point of origin the shipper billed these cars as containing rough forgings. An inspection by the Transcontinental Freight Bureau at Seattle showed that machine work had been done on all these shafts, and all four cars were classified as shafts or shafting, and freight bills showing charges upon such classification were presented to the plaintiff in error upon the basis of a Class A rate, or a rate of \$2.40 a hundred (Tr. p. 31). Later new bills were presented upon the basis of fifth class,

or a rate of \$2.37½, which is the rate sued for in this case (Tr. pp. 26, 49), plaintiff in error contending that the commodity on these cars should be classified as rough forgings, refused to pay the expense bills as presented, and returned them with a letter which is in evidence as Plaintiff's Exhibit 12 (Tr. p. 56) in this letter which referred to one of these cars, but the same position was taken as to all four cars, the plaintiff in error stated:

“We are entitled to a rate of \$1.37½ per 100 lbs. on this car in accordance with Item 3540, Page 296, Tariff 40, as this car contains Forgings and not finished shafting. The Shafting is still in the rough state and must be finished in our Shop here.”

Subsequently the plaintiff paid charges upon the basis of \$1.37½ per hundred, and this suit was filed to collect the difference between that rate and a rate of \$2.37½ per hundred, which the Railroad Administration contends is the correct rate in accordance with the duly filed and published tariffs and classifications in effect at the time of this movement.

The appointment of the defendant in error as Director General and the corporate capacity of the plaintiff in error was admitted by the pleadings. The pleadings also admit that the four cars of flanged shafts were shipped from Camden, New Jersey, and

delivery made as alleged to the plaintiff in error.

The evidence also establishes without dispute that these cars were of the weight as shown by the expense bills in evidence and that if the rate as found by the trial court applies, there is owing on account of freight charges and war tax the full amount for which judgment was entered (Tr. p. 36).

This left as the only issue, submitted to the trial court, the question as to the character of the material shipped and its proper classification under the tariffs.

On this question the defendant in error presented as a witness Mr. A. B. Cade, Superintendent of the Transcontinental Freight Bureau, Weighing & Inspection Department, North Pacific Coast Territory, such bureau being established in the interests of both the carriers and the shippers to see that all freight is properly described, so that the proper rates may be applied by the carriers, the bureau being an independent bureau and its inspection and classification service embracing all of the Transcontinental lines ⁱⁿ ~~and~~ the North Pacific Coast territory (Tr. pp. 25, 26). Mr. Cade had been connected with this work for some thirty-nine years and the inspector who inspected and classified the four cars in question was working under his direction and supervision (Tr. pp. 25, 26).

The defendant in error also introduced in evidence the effective tariffs and classifications and also the specifications produced upon its demand by the plaintiff in error and covering the shafts transported on the four cars in question (Tr. pp. 35-7, 46-7, Exhibits 5 and 6).

The plaintiff in error offered the testimony of George B. Gemmill, its Assistant Secretary, who had charge of the purchasing of the materials covered by these shipments, and W. S. Matheson, Vice President and Manager of the Bacon & Matheson Forge Company, doing business at Seattle.

The defendant in error, in accordance with the classification as made upon the arrival of these cars at Seattle, contended that the four cars of flanged shafts having been roughly machine turned, were covered by items 4, 7 and 9 of page 301 of The Western Classification No. 55 (Tr. pp. 34-5, 48), which is in evidence as Exhibit 5, Tr. p. 46.

The plaintiff in error at the trial and on its appeal contends that this classification as so made is not a proper classification, but that the commodity loaded on these cars should be classified as either rough forgings, under the authority of Tariff 4-0, page 296, Item 3540, under the general classification of iron and steel articles (Ex. 6, Tr. p. 47), or as plain shafting under item 3450, on page 293 of the same tariff, and on direct examination, while

neither had had any experience in connection with the classification of property of this character, both the witness Gemmill and the witness Matheson testified that these shipments could be called rough forgings or plain shafting (Tr. pp. 66, 70). However, on cross examination both admitted that the particular shafts in question, as shown by the specifications produced had to be prepared in accordance with plans and specifications, were machined to a certain extent, although roughly, and with flanges especially cast, at least on one end of each shaft (Tr. pp. 74, 82, 91).

The District Court at the conclusion of the argument as made by the attorneys for the respective parties found as a fact the material in question was, in fact, flanged shafts, roughly machine turned, and properly classified as Shafts or Shaftings as shown by items 4, 7 and 9, page 301, of the Western Classification No. 55 (Ex. 5), and later, Findings of Fact and Conclusions of Law were entered in accordance with the court's oral announcement.

The errors assigned all refer to alleged errors on the part of the court in entering the findings that were entered and in refusing to enter findings proposed by the plaintiff in error. No errors are assigned as to any other proceedings had at the trial.

ARGUMENT.

The shipments in question being interstate shipments, both the Director General as a carrier and the plaintiff in error as Shipper were bound by the duly filed and published tariffs governing their transportation.

In *Pennsylvania R. R. Co. vs. International Coal Mining Company*, 230 U. S. 184, the Supreme Court speaking through Mr. Justice Lamar briefly announced the principle which runs through all the cases, using this language:

“The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If as a fact the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation.”

In *Great Northern Railway Company vs. O'Connor*, 232 U. S. 508, the Supreme Court in again speaking on this same question said:

“It was not necessary to offer evidence to sustain the reasonableness of rates, classification, or other terms in the tariff filed with the Commission. The shipper had the right, by appropriate proceedings, to attack the rate or the classification, and, if either or both were held to be unreasonable, could secure appropriate relief either by reparation order, or by suit in court, after such finding of unreasonable-

ness. But so long as the tariff rate, based on value, remained operative, it was binding upon the shipper and carrier alike, and was to be enforced by the courts in fixing the rights and liabilities of the parties."

The duly filed and published tariffs governing the movement of the four cars in question are in evidence, as is the testimony of A. B. Cade, Superintendent of the Transcontinental Freight Bureau, who had for some thirty-nine years been engaged in the work of classifying commodities of this character, and familiar with hundreds of cars of the same character of material, he testified that the material on these cars was properly classified as shafts or shafting, and counsel for the plaintiff in error admitted at the trial if the material was of such a character as to be properly so classified, the amount sued for was correct (Tr. p. 36).

It is true that the plaintiff in error offered testimony which was sought to in a way contradict that of Mr. Cade and show that in fact the material transported was in fact, nothing more than rough forgings, or plain shaftings.

The District Court, however, found upon all of the evidence that the material was, in fact, shafts and properly classified in accordance with the testimony of Mr. Cade (Tr. pp. 13-17).

There was involved in the trial a question of fact as to the character of the material actually

transported; the question of its proper classification under the tariff being governed by the character of the material transported, but, as stated, this issue of fact was determined adversely to the contention of the plaintiff in error.

It would seem to be now an elementary proposition that an appellate Federal court will not review questions of fact or determine the weight to be given to evidence properly admitted, and counsel for the plaintiff in error assigned no error and makes no argument that any evidence was improperly admitted, all errors assigned going to the point that the plaintiff in error's Findings, rather than those actually signed, should have been entered, and in its brief states that the sole question presented is were the articles shipped shafts, as found by the court (Page 3, Appellant's Brief).

We believe that it is unnecessary to cite cases other than from this court in support of the rule that this court cannot and will not disturb the findings made by the District Court.

Empire State-Idaho Mining & Dev. Co. vs. Bunker Hill & Sullivan Mining & Concentrating Co., 114 Fed. 417.

Los Angeles Gas & E. Corp. vs. Western Gas Construction Co., 205 Fed. 707.

Sierra Land & Live Stock Co. vs. Desert Power & Mill Co., 229 Fed. 982.

American Trading Co. vs. North Alaska Salmon Co., 248 Fed. 665.

Oakland Water Front Co. vs. LeRoy, 282 Fed. 385.

The plaintiff in error in the first five lines under the heading of "Argument" makes the statement that there is no dispute as to the facts in this case, and that the sole question involved is one of construction and opinion, and that one man's opinion is as good as another's, and that the question involved is not one for expert evidence. However, with the exception of these five lines, all of the remainder of the argument consists of an argument of the facts, each page of the brief, excepting page 10 and two lines on the last page containing references to the testimony in support of the claimed error of the court in refusing to find that the material in question was not rough forgings, or that the court erred in holding that the materials in fact were shafts. For example, immediately after the opening paragraph of the argument, counsel refers to the plans and specifications (Exs. 1-4) and discusses the proper interpretation thereof as given by his witnesses.

There would have been no law suit if there had not been a dispute as to the question of fact as to whether these shafts were rough forgings or in fact shafts, and in this connection the statements on

pages 5 and 6 of the plaintiff in error's brief that the trial court may have been misled by the blue prints in evidence after taking the case under advisement is an inadvertence on the part of the attorney writing the brief, who apparently did not participate in the trial, for the record shows by questions propounded by counsel for both parties, and by the court himself that it was not contended that these shafts were machine turned down further than to one-eighth inch of final finish, and the fact is that the case was not taken under advisement, but the court announced his findings under the facts and the law immediately upon the conclusion of the argument.

In view of the errors assigned, and the argument as made in the plaintiff in error's brief, we respectfully submit that there is nothing for this court to pass upon. However, at the risk of unduly burdening the court, and for the sole purpose of making it easier for the court to understand the record, in view of our possible inability to orally present the case, but without in any way conceding the necessity therefor, as a legal proposition, we will endeavor to briefly deal with the facts developed at the trial.

Page 301 of the Western Classification No. 55, in evidence (Exhibit 5), which the defendant in error contends covers the proper classification of this material, under a general heading of Machinery and Machines, specifically covers shafts or shafting, the portion of said page applicable to the commodities covered by this case reading as follows:

- “Item 4. SHAFTS or SHAFTING, iron or steel,
other than Crank Shafts:
5. With CAMS or FITTINGS, other than
couplings, attached, such as
bearings, pulleys or wheels:
Loose or in packages, L.C.L.....1
Loose or in packages, C.L.,
min. wt. 30,000 lbs.....A
6. With COUPLINGS ONLY ATTACHED:
Loose or in packages, L.C.L.....2
Loose or in packages, C.L.,
min. wt. 30,000 lbs.....A
7. Without CAMS, COUPLINGS or FITTINGS:
8. KEY-LEAVED or KEY-SEATED:
Loose or in packages, L.C.L.....3
Loose or in packages, C.L.,
min. wt. 36,000 lbs.....A
9. Not KEY-LEAVED NOR KEY-SEATED:
Loose or in packages, L.C.L.....4
Loose or in packages, C.L.,
min. wt. 36,000 lbs.....5”

It will be noted that this is a general heading covering shafts and shafting, this shipment being classified under items 4, 7 and 9, that is, as shafts

or shafting without cams, couplings or fittings, and not key-leaved nor key-seated. The '5 after item 9 refers to the fifth class as contained in the tariff and, as stated, it is admitted that the rate sued for is the fifth class rate as contained in the tariff, the class A rate being higher.

The two tariff provisions under which the plaintiff in error sought to have these shipments classified are both found in West-Bound Tariff No. 4-0, in evidence as Exhibit 6, the item referring to forgings being included with other similar articles under item 3540, on page 296 under the head of articles of Iron and Steel, the particular section reading as follows:

“CASTINGS, N.O.S., as from mold, except being cleaned and drilled with bolt holes and dipped to preserve from rust, not machine-finished.
Clevises,

Forgings, N.O.S., not further finished than being drilled with bolt holes,

3540

Wheels, sprocket, N.O.S., as from mold, except being cleaned and drilled with bolt holes and dipped to preserve from rust, not machine-finished.

NOTE. Articles described above may be shipped in mixed carloads with articles described in Item 3525 at rates and minimum weight named therein.

(2) Advance to points in “Rate Basis 3” of previous tariff.

(9) For explanation, see page 112.”

The other classification covering plain shafting sought by the plaintiff in error to have applied is under a similar heading, being included in Item 3450 on page 293:

3450	“Band,	Rod, (threaded or not threaded),
	Bar,	<i>Shafting, plain (See Note 1),</i>
	Bars, corrugated or twisted,	Slab (up to and
	Hoop,	including 6 inches in width).

Note 1.—Carload rates apply only on plain shafting without connections.”

The letters “N.O.S.” following the word “forgings,” in item 3540, mean “Not Otherwise Specified in the Tariff” (Tr. p. 37).

It will be noted that *item 3450 refers solely to plain shafting*, and this is further modified by Note 1 which specifically provides that this shafting must be *without connections*, and there is considerable evidence in the record as to what plain shafting embraces.

There are in evidence, as Exhibits 1, 2, 3 and 4, the specifications produced upon demand by the plaintiff in error covering these shipments, and Mr. Cade testified, both from the records as made by his inspector, from his knowledge of the articles shipped, and from these specifications, that the contents of these cars were properly classified under Items 4, 7 and 9, page 300 of the Western Classification (Ex. 5), and were in fact shafts or shafting without cams or couplings, or fittings, and not key-

leaved nor key-seated (Tr. pp. 32, 34). He further testified that they could not be classified as forgings under Item 3540 as that item covered only forgings, not otherwise specified, and *not further finished than being drilled with bolt holes* (Tr. p. 32). This, of course, is exactly what the tariff describes, and, admittedly, these shafts were further finished in that they were turned to within one-eighth of an inch of final finish, those that were to be tapered were tapered, and flanges were forged and machined to some extent on at least one end of each piece.

Mr. Cade also testified that Item 3450 referring to plain shafting could not be applied as a coupling was forged on the end of each of these shafts, and that the shafting therein referred to meant what it said, i. e., plain shafting, such as was commercially carried and used (Tr. pp. 32, 98).

Mr. Cade testified that there was a great volume of shafts of this character shipped to the Pacific Coast during this same period, hundreds of cars, and that uniformly charges had been assessed in accordance with the rate set forth in the Western Classification under the heading of shafts and shafting, either upon the basis sued for herein or upon the basis of the Class A rate, which was 2c higher. The Interstate Commerce Commission later, in the case referred to in the plaintiff in error's brief, and in which Mr. Cade participated (66 I. C. C. 633)

held that the Class 5 rate, being the rate for which suit was brought, was applicable to this identical material (Tr. pp. 42-3), and that any freight collected in excess thereof on the basis of the Class A rate would amount to an overcharge (Tr. p. 55, Exhibit 12).

Mr. Cade also testified that not a single car or shipment, to his knowledge in all of his experience, machine or hog turned as was this, had ever been classified as forgings or plain shafting (Tr. p. 101). ~~given effect by the trial court (Tr. p. 42) or been classified as forgings or plain shafting (Tr. p. 1017).~~

Mr. Cade, after having examined his records and the specifications and prints as produced by the plaintiff in error (Exs. 1, 2, 3 and 4), testified as follows with reference to this material:

“The material as originally shipped from Camden, New Jersey, was described by the shippers as so many pieces of rough forgings. Upon arrival at Seattle they were inspected by an inspector in my employ who, after an inspection of the material described them as rough-turned shafts, and, under a ruling received from the Western Classification Committee he also, in parenthesis, described them as machinery, indicating that the machinery carload rate was applicable. The material as indicated by blue-print and specifications shows the shipment or shipments to have consisted of what is termed rough-machined line shafts with flanges which are used as a coupling in connecting the lines. Those flanges—this material is further finished than is provided for in the

commodity tariffs which do provide a rating on forgings not further finished than being drilled with bolt holes.

“These particular shafts have been placed through a lathe and rough turned to within somewhere, I should say, within $\frac{1}{8}$ of an inch of their final finished dimension.

“Under the conditions in which these particular shipments moved the provision in our transcontinental west-bound (31-10) commodity tariffs for forgings not further finished than bored with bolt holes, would not be applicable as they are specific provision and cover articles specified only, and would not apply upon an analogous article.” (Tr. page 31-32.)

“We also carry in our West-bound Commodity Tariffs a provision for plain shafting, * * *.” (Tr. page 32.)

“The understanding of the chairman of the Western Classification Committee that this type of shafting is not what is known to the trade in general as plain shafting; plain shafting being a round bar polished, sometimes cold-drawn, as they term it, through a die, which is used in transmission machinery where they run a line of shafting from one end of a building to another. That is a straight bar of steel similar to my pencil (illustrating), excepting various dimensions, without any coupling or any flange or any shoulders like that (illustrating). That is what is termed plain shafting.

“If this shafting is equipped with an extending flange, shoulders or projections of any kind, it ceases to be what is termed plain shafting in the classification sense.” (Tr. pp. 32-33.)

This same witness, in answering the question put to him by the court as to the distinction from a rough forging, said:

“A shafting may be a forging, in its rough stage, which I will illustrate to you by pamphlets which I have here (showing). This pamphlet illustrates a steel ingot as poured into a mould; the ingot is then put into the furnace, heated and put under the hammer or press, illustrating what is termed a forging (showing) and, if it please your Honor, that is rough and still a forging, but it is in rough stage. There is a forging (showing another picture). Now, that later is put through a lathe. This shows a shaft in the lathe being turned (showing). That is the machine work that is placed on the article which brings it out and shows a further finish than the rough forging; that is turning down to a required dimension as shown in the specification.” (Tr. page 40.)

He further testified that his experience had brought him in touch with a large volume of shipments of the same character, as well as with large quantities of just plain forgings, and in this connection testified:

“There has been a very heavy movement of this same material, line shafts, tail shafts and thrust shafts used in the shipbuilding industry during the war period, and our inspectors have watched the movement and properly described the material, and the 5th class rate has been applied. In some instances the class “A” rate has been applied through misunderstanding, which is 2c per hundred pounds higher than the 5th class rate from that particular territory.

“But the 5th class rates have been generally applied by all the North Coast lines and the lines leading into California, on this type of material until at a later date a specific rating

was provided by the West Bound Commodity Tariff." (Tr. page 42.)

In response to questions of Mr. Bronson, on behalf of the plaintiff in error, as to the blue prints which also showed the finished article, the witness testified that he considered, and the report of his inspector showed that the inspector considered these shafts only as being machine turned within $\frac{1}{8}$ of final dimension. (Tr. page 46.)

On behalf of the plaintiff in error, *Mr. Gemmell*, its assistant secretary, who placed the orders for this material, *testified*:

"*We ordered the shafting from the Camden Forge Company, rough turned to within $\frac{1}{8}$ of the finished size. That is, after we received the shafting we had to take off $\frac{1}{8}$ inch all over, or $\frac{1}{4}$ of an inch in diameter of the shafting and the couplings—(59-38) those flanges.*" (Tr. page 62.)

He further testified that the expense of the machine work would not exceed from two to three per cent of the purchase price, and that the real purpose of having the shaft machined or roughly turned was to be sure that it was not defective, the machining of the rough forging down to $\frac{1}{8}$ of an inch of final dimension being such as would disclose any defects. (Tr. pp. 64-65.)

He also testified that he believed that this material could be considered as coming under Items

3540 and 3450 of the Commodity Tariff, which items are above set forth. In this regard he testified:

“Q. In your opinion, Mr. Gemmill, as a machinery man, state to the court whether or not the shafting which is under discussion here comes within the definition in this Westbound Freight Tariff 4-O, page 296, Item No. 3540, specifying ‘Forgings, N.O.S., not further finished than being drilled with bolt holes?’

A. I believe that it does.

Q. What is your opinion as to whether or not it comes within the definition contained on page 293, of the same book under ‘Shafting, plain,’ with the note below, ‘Carload rates apply only on plain shafting without connections’?

A. That rate can also be applied.” (Tr. pages 65-66.)

On cross-examination Mr. Gemmill’s attention was called to the specifications (Exhibits 1, 2, 3 and 4) wherein *he had ordered* not forgings or shafting, but “*forged steel shafts, rough turned,*” and finally admitted that this material used as it was on boats and in boat construction was ordinarily referred to as “*shafts.*” (Tr. p. 90.)

He further testified that the machinery houses would carry in stock ordinary shafting such as described by Mr. Cade, but that no machinery house carried in stock such shafts as were loaded on these cars, nor would the manufacturer carry them in stock, and in this regard he testified:

“Q. As a matter of fact, these shafts

which you had made were all made in accordance with plans and specifications submitted?

A. They were.

Q. And the shafting which you carry on hand for your ordinary trade is the ordinary straight shafting such as is contained in that catalog, or of a similar character—Meese & Gottfried's?

A. Yes, sir, we carry that in stock." (Tr. pp. 91-92.)

This same witness testified that while they had never ordered considerable forgings with holes drilled only, as covered by Item 3540 of the Commodity Tariff, it was a fact that forgings of this character were purchased and were shipped to the Pacific Coast. (Tr. pp. 94-95.)

Mr. Matheson, the other witness for the plaintiff in error, testified, after reference was made to the provisions in the commodity tariff set forth by Item 3540 and then as to item covering plain shafting, as follows:

"Q. Are these forgings within such a description as that, *Mr. Matheson*?

A. Yes, I would say so, that they were.

Q. I will ask you whether or not they could come within the description here on page 293 of the same exhibit, 'shafting, plain,' having reference to Note 1, which reads as follows: 'Carload rates apply only on plain shafting without connections'; in other words, are they plain shafting and without connections?

A. Yes, that is their description.” (Tr. p. 70.)

He also testified that the rough turning, or machine work, was done on these shafts for the purpose of determining whether or not there were any defects, and that the additional expense would only be from two to four per cent. (Tr. pp. 71-72.)

On cross-examination and referring to this material as distinguished from plain shafting, Mr. Matheson testified:

“Q. What do you use in ordering these particular articles; do you order shafting or do you order shafts, and in what way are they referred to on the prints and one thing and another which you prepare?

A. *Well, it would be a shaft.*

Q. A shaft—and all of these shafts as shown in evidence here are prepared according to blue-prints and specifications which are furnished, are they not?

A. Yes, sir.

Q. Now, there is such an article as plain shafting, as that term is understood in commercial business; is there not?

A. Yes, sir.

Q. And stocks of plain shafting are carried by various dealers in that character of articles?

A. Yes.

Q. Do you carry plain shafting?

A. We do not.

Q. Who does carry plain shafting in Seattle, if anyone?

A. Machinery houses carry it.

Q. And they have regular stock sizes, don't they?

A. Yes.

Q. And did you ever know of any commercial shafting carried in stock by machinery houses that was other than ordinary straight shafts?

A. No, I think not.

Q. If you want a shaft or shafting made with flanges on the end or anything of that kind you have to order it made, don't you?

A. Yes." (Tr. pp. 74-75.)

He also testified that rough forgings were ordered at times without any machine work (Tr. p. 77) and that when any machine work is done such as was called for by the specifications in this case there was a charge therefor.

Mr. Matheson's attention was then called to the specifications sent to the foundry, and as a matter of convenience for the court, and for the purpose of showing that this material was more than plain rough forgings, not further finished than being drilled with bolt holes, we quote some questions referring to the specifications, and Mr. Matheson's answers:

"Q. Now, referring to the next page, 'Tail shaft forgings rough turned to within $\frac{1}{8}$ inch

to 3/16 inch of finished diameters including taper and threaded ends, flanged coupling to have 1/8 inch finish all over as per drawing'; what does that mean, Mr. Matheson?

A. The end of a tail shaft is tapered to receive the propeller.

* * * * *

Q. That end is tapered down more than the main body of the shaft will be when it is completed, is it not?

A. Yes.

* * * * *

Q. Now it says 'Line shaft forgings rough turned to within 1/8 inch to 3/16 inch of finished diameters; flanged couplings to have 1/8 inch finish allowed all over.' What does that mean—flanged couplings to have 1/8 inch finish allowed all over?

A. Well, there is the flange on the end of the shaft. There is 1/8 inch material left all over.

Q. In other words, they were to leave 1/8 of an inch for the purpose of being finished out here?

A. There is 1/8 of an inch left on there all around.

* * * * *

Q. This says they can't go less than 1/8 of an inch. What interest would the Puget Sound Machinery Depot have in stopping them from doing more work if they were willing to do it at the same price? They, apparently, restrict them to finishing these couplings or flanges to an extent that they must not get closer than 1/8 of an inch.

A. Well, that is good practice. They could remove that 1/8 finish as easily as they could a 1/16. What I mean is that in taking the

finishing cut the lathe will remove $\frac{1}{8}$ as easily as $\frac{1}{16}$.

* * * * *

Q. (Interposing) That they were to turn the shaft proper, and they were to turn down the taper end?

A. Yes.

Q. And they were to turn the small flange end?

A. Yes.

Q. With flange on one end $8\frac{3}{4}$ inches diameter and the other tapered?

A. Yes.

Q. That means just one flange?

A. One end is tapered and the other end is slightly larger than the main part of the shaft. The main part is $7\frac{1}{2}$ inches and the flange end here is $8\frac{3}{4}$ inches.

Q. On the other, No. 40, it says 'Forged steel shafts rough turned to within $\frac{1}{8}$ inch of finished diameter including taper and threaded ends'—it should be on each end?

A. Yes.

Q. Now, in that case, as they would come from the factory with this rough turning, they would have this rough turned smooth and straight until it would get to each end and then both ends would be rough turned down to a point within $\frac{1}{8}$ inch of the final dimension?

A. Yes." (Tr. pp. 80-82.)

In referring to the specifications in Item 3540, forgings with bolt holes only:

"Q. There are a great many different kinds of forgings?

A. Yes.

Q. And many of these forgings which are not for propeller shafts, do have holes drilled in them?

A. Yes.

Q. In the rough.

A. Yes.

Q. For wagon axles and purposes of that kind, that is correct?

A. Yes."

* * * * *

"Q. Now, it is not uncommon for forgings, without anything else being done to them, to have holes drilled in them?

A. No, sir, it is not." (Tr. pp. 82-83.)

There was produced by defendant in error and in evidence a machinery catalog (Exhibit 13) covering plain shafting, and both Mr. Gemmill and Mr. Matheson testified that such shafting was carried in stock both by the manufacturer and by the wholesaler, but that shafts such as ordered by the plaintiff in error always were constructed strictly in accordance with specifications submitted, and, of course, would not be carried in stock.

Further, Item 3450 of the tariff itself covers only plain shafting, without connections. There were connections, i. e., flanges forged on these shafts that were made to special order, and, with all due respect, we believe that the attempted classification

of this shipment as plain shafting is utterly without any merit.

We believe the specifications of themselves show that this material was not rough forgings not otherwise finished than by drilling for bolt holes, although further work had to be done in order to fit the shafts. True, the expense was only from two to four per cent, but both witnesses for the plaintiff in error testified that if these shafts were brought out to the Pacific Coast and lathed and found defective the manufacturer would have to take them back, and it is clear from the record that quite often these forgings when they were put in the lathe develop defects, so that there is a large item of additional value that is added by the machine work done at the plant, but irrespective of this fact, the tariff and classification as made, filed and published, become effective as a part of the statute itself, and neither the carrier nor the shipper can depart therefrom. If the shipper thinks that the rate is wrong, he cannot disregard the tariff, but is afforded full relief upon paying the tariff charges and filing his application for reparation with the Commission.

The conclusions offered by both Mr. Matheson and Mr. Gemmill are not based on any study of the tariff and classification. The item as to forgings covers only forgings that are not otherwise specified, and ~~their conclusions in the light of the testimony~~

of Mr. Cade and the fact of the uniform application of the classification as made by the Director General upon hundreds of shipments will not be lightly overturned by any court.

3.

If there could be any question upon the classification of this material as made by those competent and skilled to make it, the matter has been put to rest by the opinion of the Interstate Commerce Commission in the case of *Northwest Steel Company vs. C. B. & Q. R. R. Co.*, 66 I. C. C. 633, which involved this identical commodity, and in passing upon the contention in that proceeding that this same commodity was but rough forgings, the Commission says:

“The articles shipped were *not rough forgings as contended* by complainants and interveners. While not finished shafting they had progressed in manufacture beyond the forging state and were cognizable as shafting.”

A reading of this opinion shows that a great number of ship building concerns intervened and it is safe for this court to assume that men skilled and able in the interpretation of tariffs and classifications and representing the shipbuilding industry, participated in this hearing; yet no one apparently had the temerity to suggest that these shafts should be classified as plain shafting, although the commis-

sion in comparing rates does refer to the item covering plain shafting. The contention was made, as was originally made in its initial letter (Ex. 12) by the plaintiff in error, that they were entitled to a rate covering rough forgings, but the commission, notwithstanding the fact that the evidence in those cases showed that the shops at a point of origin had not even machined down the steel to one-eighth of an inch final finish, nevertheless held that they were out of the category of rough forgings and were properly classified as shafts and took the fifth class rate.

While the plaintiff in error did not participate, as far as the record shows, in this hearing, it had a right to the benefits thereof, by paying the lawful charges in compliance with the positive mandates of the statute, under the authority of the case of *Phillips Company vs. Grand Trunk Railway*, 236 U. S. 662; 59 L. Ed. 774; and we respectfully submit that having such right it, in reason, should be likewise bound by the classification of this identical material as made by the Commission at a hearing held upon this coast in which the identical questions involved were determined.

The Interstate Commerce Commission has at its disposal a corps of trained experts versed in matters of this character. If an appeal had been taken, as we understand the law, no court would

have attempted to have interfered with its determination as to the character of this same kind of material.

Seaboard Air Line vs. U. S. 254 U. S. 57;
65 L. Ed. 129.

The findings of the Commission with reference to this character of material, even if held not conclusive, will be treated by this court as so persuasive as not to be overcome excepting upon a clear showing.

It may be thought, inasmuch as the Commission held that the rate of \$1.69, as subsequently established is a reasonable rate (although later again raised, *Cade Tr.* p. 44), and awarded reparation to other shippers of this same commodity to this same territory, that then this court should confine the recovery to such rate basis. There are two answers to any such contention:

First: That plaintiff in error is not entitled to be heard until it has complied with its legal duty to pay the only legal rate which could be assessed at the time the shipment moved.

Second: That while its attention was called to the necessity of so doing and then filing its claim for reparation it has failed so to do until the period of limitations against any claim for reparation has elapsed. (*Tr.* p. 50.)

In this connection we call attention to the case of *Phillips Co. vs. Grand Trunk R. R. Co.*, 226 U. S.

662, 59 L. Ed. 774, in which the court said in a case in which reparation had been allowed certain shippers but in which the shipper in question had not brought his action within the statutory period:

“The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carriers. The railroad company was therefore bound to claim the benefit of the statute here, and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action.”

We also cite the case of *U. S. ex rel. Louisville Cement Co. vs. I. C. C.*, 246 U. S. 638, 62 L. Ed. 914. This case also goes into the question of the right to obtain reparation after the lapse of the statutory period, and is cited only for the reason that the claimant refused for a long period of time to pay the tariff rate but finally did pay it and filed his claim, the court holding, however, in this case that the limitation period did not commence to run until payment was made.

In any event, this court and all parties are bound by the tariff as it existed at the time these

shipments moved, as shown by the terms of the statute and as construed by the authorities we have already cited.

In *Pierce Co. vs. Wells-Fargo Co.*, 236 U. S. 278, 59 L. Ed. 576, Mr. Justice Day used the following language:

“If the rates were unreasonable, it is for the Commission to correct them upon proper proceedings. If this were not so, the interstate commerce act would fail to make effectual one of its prime objects, the prevention of discrimination among shippers. So long as the tariffs are adhered to, shippers under the same circumstances are treated alike.”

The judgment entered by the District Court should be affirmed.

GEO. T. REID,

C. H. WINDERS,

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of IRVING WHITEHOUSE COMPANY,
a Corporation, Bankrupt.

L. C. REAM, HAZEL MOWERS, MABEL CONNOR, H. E.
WOODLAND, MAUDE MOWERS, OSCAR LANTOR,
CHARLES THEIS, ALEXANDER STEPHENS, O.
W. WITTMER, T. S. LANE, DAVID ACKERMAN,
STANLEY HODGMAN, and AUGUSTA W. HOWELL,
Petitioners and Appellants,

vs.

W. S. McCREA, as Trustee in Bankruptcy of the Estate
of IRVING WHITEHOUSE COMPANY, a Corpora-
tion, Bankrupt,

Respondent and Appellee.

**APPEAL FROM AND
PETITION FOR REVISION**

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of Law, of
an Order of the United States District Court
for the Eastern District of Wash-
ington, Northern Division.

FILED
JUL 10 1933
RECEIVED

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of IRVING WHITEHOUSE COMPANY,
a Corporation, Bankrupt.

L. C. REAM, HAZEL MOWERS, MABEL CONNOR, H. E.
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W. WITTMER, T. S. LANE, DAVID ACKERMAN,
STANLEY HODGMAN and AUGUSTA W. HOWELL,
Petitioners,

vs.

W. S. McCREA, as Trustee in Bankruptcy of IRVING
WHITEHOUSE COMPANY, a Corporation, Bank-
rupt,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of Law,
an Order of the United States District Court.
for the Eastern District of Wash-
ington, Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States Circuit Court of Appeals for the
Ninth Circuit.

IN BANKRUPTCY—No. —.

In the Matter of IRVING WHITEHOUSE
COMPANY, a Corporation,
Bankrupt.

L. C. REAM, HAZEL MOWERS, MABEL CON-
NOR, H. E. WOODLAND, MAUD
MOWERS, OSCAR LANTOR, CHARLES
THEIS, ALEXANDER STEPHENS, O.
W. WITTMER, T. S. LANE, DAVID
ACKERMAN, STANLEY HODGMAN,
AUGUSTA W. HOWELL,
Petitioners,

vs.

W. S. McCREA, as Trustee in Bankruptcy of
IRVING WHITEHOUSE COMPANY, a
Corporation, Bankrupt,
Respondent.

Petition to Revise in Matter of Law.

To the Honorable Judges of the Circuit Court of
Appeals of the Ninth Circuit of the United
States:

Your petitioners respectfully show:

I.

That W. S. McCrea is the duly qualified and act-
ing Trustee in Bankruptcy of the estate of Irving
Whitehouse Company, bankrupt, which was so ad-
judged a bankrupt in the District Court of the

United States for the Eastern District of Washington, Northern Division, on the 2d day of December, 1921.

II.

That on August 3, 1921, a receiver was appointed for the bankrupt by the Superior Court of the State of Washington in and for the County of Spokane; that on this day Hutton & Company of New York City, brokers, held as collateral securities deposited by the bankrupt to the amount of approximately \$48,000, against which Hutton & Company had an indebtedness of \$37,690.01. These securities, upon the order of the said court, were directed to be sold by the receiver, and Hutton & Company then sold said securities, deducting its indebtedness from the proceeds thereof, and remitting the balance to the receiver, said balance being \$10,467.27. This balance afterwards came into the hands of the trustee in bankruptcy and is now held by the trustee. Part of the securities so deposited with Hutton & Company belong to and are the property of these petitioners in the amounts and particular securities mentioned in the stipulation included herein.

III.

After such adjudication your petitioners filed a petition with the referee in bankruptcy, Sidney H. Wentworth, Esquire, to whom the bankruptcy matter had been referred, claiming said securities and the proceeds thereof and praying that the proceeds be distributed to these petitioners. A show cause order was issued, directing all parties interested to appear and show cause on a certain day why

said petitions should not be granted and to assert any claim to said fund, if any they had. On the return day of said show cause order, to wit, February 25, 1923, at 10 o'clock A. M., no other claimants appeared and no other claim has been made to any of said fund. A hearing was had between the petitioners on the one side and the trustee on the other, and the referee made an order in favor of these petitioners and adjudging them the fund as their interests appeared. The trustee, feeling aggrieved thereat, took a review of said order to the District Judge, and on the 31st day of July, 1923 an order was entered by the Honorable Jeremiah Neterer, District Judge, sitting in the Eastern District of Washington, Northern Division, reversing the order of the referee, a copy of which order is hereto annexed and made a part hereof. A copy of the order of the referee is also hereto annexed and made a part hereof.

IV.

The facts are stipulated and undisputed and are as follows:

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 3812.

In the Matter of IRVING WHITEHOUSE
COMPANY,

Bankrupt.

debt. If a full payment was made thereafter, the amount was forwarded to Hutton & Co. and the securities released and sent on to Irving Whitehouse Company. If sales were made of the collateral held by Hutton & Co., the amount received was credited by Hutton & Co. in reducing the amount of the debt owed them. In all marginal dealings it was agreed between Irving Whitehouse Company and the customer that the securities purchased as well as the collateral put up by the customer to secure his account with the bankrupt might be rightfully repledged. As a matter of fact almost all the collateral held by Hutton & Co. to secure the Irving Whitehouse Company account was composed either of the securities bought by marginal traders or securities deposited by them as collateral. The permission to repledge did not, however, confer upon the bankrupt the right of doing anything more than merely repledging the securities, and it was understood that if the amount due *on any account* on any account was paid in full, the bankrupt must at once deliver either the identical securities put up as collateral, or purchased, or others exactly similar thereto. In no event did the bankrupt have the right to sell such securities or authorize Hutton & Co. to do so, unless for the protection of the customer's account. For some time Irving Whitehouse Company had been accustomed to speculate on the market through an account known on its books as "Account 40." Sales and purchases were made for the benefit of the company through this account, and it developed that

often sales were made of securities owned not by Irving Whitehouse Company, but by its customers, so that the total actually held by Hutton & Co. for the customers of Irving Whitehouse Company was always much less than the total credited on the bankrupt's books to its customers. This total was likewise cut down by the following course of dealing: If, for instance, the bankrupt received orders to buy 200 shares of a certain stock, and on the same day an order to sell 100 shares, these orders would be forwarded to Hutton & Co., who would go upon the market and buy for Irving Whitehouse Company the difference, that is, 100 shares only, the long and short orders in such cases being balanced as to the remainder by book entries.

Due to various reasons, for some time prior to August 3, 1921, Irving Whitehouse Company was insolvent and had taken to the practice of pledging with Hutton & Co. securities left with it for safe-keeping or for sale, which it had no right to pledge. Moreover, at least once before that date, the bankrupt directed Hutton & Co. to sell certain securities held on its account but which did not belong to it but were the property of its customers pledged under the understanding outlined above. As a result of these transactions, on the aforesaid date Irving Whitehouse Company was indebted to its customers who were dealing in eastern stocks and bonds through Hutton & Co. either on marginal or cash basis, in the sum of \$211,098.27, computed on the basis of what the securities would have been worth on said August 3, 1921. In addition to this,

the company was indebted to various other creditors in excess of the security held by such concerns to an amount of approximately \$90,000. None of these debts have been paid. On the said 3d day of August, 1921, at the suit of one of the creditors, a receiver, F. K. McBroom was appointed by the Superior Court of Spokane County, Washington, and shortly after his appointment he instructed Hutton & Co. to sell out all securities held in the Irving Whitehouse account. The securities, the price at which they were sold, and the exact time of the respective sales, are shown by the list set out below:

t

No. of Shares	Description	Price	Amount credited to Irving Whitehouse Co. Less E. F. Hutton Com. & Tax.		
			Sold Amount	Date Executed	Time Executed
10	Mexican Petroleum	105 $\frac{3}{4}$	1,055.60	Aug. 5, 1921	11.27
23	Kennicott Copper	18 $\frac{5}{8}$	424.01	Aug. 5	11.27
10	General Motor 6% Deb	63 $\frac{7}{8}$	636.85	Aug. 5	12.42
20	Montana Power	44 $\frac{3}{4}$	891.20	Aug. 5	2.39
30	Missouri Pacific Pfd.	40 $\frac{1}{8}$	1,198.05	Aug. 5	11.27
30	Northern Pacific Ry.	76 $\frac{3}{4}$	2,296.80	Aug. 5	11.27
10	Pennsylvania Ry.	36 $\frac{7}{8}$	367.05	Aug. 5	12.49
4	Pacific Oil	36 $\frac{1}{4}$	143.84	Aug. 5	11.27
5	Pan American Pete B	42	208.88	Aug. 5	12.28
1/10	" " "	40 $\frac{3}{4}$	3.04	Aug. 5	1.02
8	Pullman Company	94 $\frac{1}{2}$	754.48	Aug. 5	1.18
17	" "	93 $\frac{1}{4}$	1,582.02	Aug. 5	2.06
25	Pure Oil	26 $\frac{3}{8}$	655.35	Aug. 5	1.51
20/50	" "	25 $\frac{1}{2}$	9.16	Aug. 5	2.12

No. of Shares	Description	Price	Sold Amount	Date Executed	Time Executed
10	Pierce Arrow	121 $\frac{7}{8}$	139.35	Aug. 5, 1921	12.49
15	Royal Dutch	51	762.63	Aug. 5	12.49
14	U. S. Rubber	52	725.34	Aug. 5	11.27
21 $\frac{1}{2}$	Retail Stores	53 $\frac{5}{8}$	132.94	Aug. 5	1.50
10	Southern Ry.	19 $\frac{7}{8}$	196.85	Aug. 5	2.43
15	Sullivan	41	612.15	Aug. 5	2.27
10	"	42	418.10	Aug. 9	12.43
15	Sears Roebuck	65 $\frac{1}{8}$	974.03	Aug. 5	12.27
23	Swift & Company	98	2,250.00	Aug. 5	
4 $\frac{1}{3}$	Studebaker	78 $\frac{1}{8}$	337.34	Aug. 5	11.47
15	U. S. Food	171 $\frac{7}{8}$	254.03	Aug. 5, 1921	12.28
5	United Smelting Pfd.	36 $\frac{7}{8}$	183.18	Aug. 9	10.30
1	United Pacific	120 $\frac{1}{2}$	119.46	Aug. 5	12.28
11	Westinghouse Elec.	43 $\frac{3}{4}$	479.36	Aug. 5	1.55
300	Denny Oil	12	10.96	Aug. 5	11.06
(200	" "	10	18.92	Aug. 5	11.06
20	Silver King of Arizona (New (100 Silv. King of Ariz. Old)	5	.96	Aug. 5	11.08

No. of Shares	Description	Price	Sold Amount	Date Executed	Time Executed
1000	Canada Copper	35	341.00	Aug. 5, 1921	10.56
1000	Canada Copper	30	292.00	Aug. 5	10.56
33	"	28	8.16	Aug. 5	10.56
11	Columbia Graphophone	4 ³ / ₈	46.49	Aug. 5	12.03
3	Anglo American Oil	15 ¹ / ₄	44.71	Aug. 5	11.10
30	New Cornelia	13 ¹ / ₂			
	(Boston)				
50	Transcontinental Oil	7 ⁵ / ₈	400.42	Aug. 5	10.55
15	American Ship & Commerce	6 ³ / ₄	375.50	Aug. 5	12.11
30	General Motors	10 ¹ / ₄	99.52	Aug. 8	2.52
25	Invincible Oil	7 ¹ / ₈	301.80	Aug. 5	11.27
44	Willys Overland	6 ¹ / ₂	175.73	Aug. 5	11.27
100	"	6 ⁵ / ₈	282.26	Aug. 5	11.47
			654.00	Aug. 5	10.53
5	American Beet Sugar	29 ⁵ / ₈	146.93	Aug. 6	10.21
20	Allis Chalmers	31 ³ / ₈	623.70	Aug. 5	12.11
10	American Can	26 ¹ / ₂	263.10	Aug. 5	11.27
28	American Sugar	66 ¹ / ₄	1,849.68	Aug. 5	11.27
20	Central Leather	33 ¹ / ₈	658.70	Aug. 5	11.47
25	Certainteed Products	21 ³ / ₄	539.00	Aug. 6	11.54

No. of Shares	Description	Price	Sold Amount	Date Executed	Time Executed
15	Amer. Hide & Leather Pfd.	50 $\frac{7}{8}$	760.28	Aug. 5	2.40
10	Chesapeake & Ohio	55 $\frac{7}{8}$	556.85	Aug. 5	12.49
15	Cuban American Sugar	16 $\frac{1}{4}$	241.42	Aug. 5	11.27
17	China Copper	22 $\frac{5}{8}$	382.04	Aug. 5	12.29
35	Chile Copper	10	334.39	Aug. 5	11.27
10	Great Northern Ore	27 $\frac{7}{8}$	277.25	Aug. 5	11.27
15	St. Paul Common	27 $\frac{1}{8}$	404.03	Aug. 5	2.50
10	" " Pfd.	41 $\frac{5}{8}$	414.35	Aug. 5	11.47
19	Cerro De Pasco	25 $\frac{7}{8}$	488.02	Aug. 5	11.00
9	Chicago, Rock Island A	75 $\frac{7}{8}$	681.17	Aug. 5	1.55
11	General Electric	117 $\frac{1}{2}$	1,290.41	Aug. 5	11.00
2/100	" "	116	1.28	Aug. 5	1.02
50	General Asphalt	53 $\frac{3}{8}$	2,659.25	Aug. 5	11.00
20	Greene Cananea	20 $\frac{7}{8}$	413.70	Aug. 5	12.41
100	International Nickel	14	1,384.00	Aug. 5	(10.14)
200	" "	13 $\frac{3}{4}$	2,718.00	Aug. 5	(10.24)
25	" "	13 $\frac{7}{8}$	342.85	Aug. 5	(10.53)
5	Midvale Steel	24 $\frac{3}{4}$	147.38	Aug. 5	11.00

No. of Shares	Description	Price	Sold Amount	Date Executed	Time Executed
100	Loews Theatre	113 $\frac{3}{4}$	1,156.00	Aug. 5, 1921	10.23
50	Middle States Oil	11 $\frac{5}{8}$	573.55	Aug. 5	11.00
2 $\frac{1}{2}$	" "	11 $\frac{1}{4}$	27.05	Aug. 5	11.53
600	Sears Roebuck Scrip	95	586.50	Aug. 5	11.36
3	Libby	9 in Chicago	24.98	Aug. 9	11.39
2	Texas Company		.29		
22	Midwest (or Standard Oil of India)	70 $\frac{1}{2}$	2,094.96	Aug. 5	11.04
5	Stand. Oil of New Jersey Fef.	107 $\frac{5}{8}$	536.93	Aug. 16	10.19
5	Standard Oil of New Jersey Co.	135 $\frac{1}{4}$	577.25		
	This purchase of S. O. N. J. Com. and sale of S. O. N. J. Pfd. was to clear books because of a short and long caused by 5 S. O. N. J. Com. being transferred for Myron Morland when 5 S. O. of N. J. Pfd. should have been issued in his name. Error made by Irving Whitehouse Co. in July, 1921.				
\$1000	Chile 6's—1932.	71 $\frac{3}{4}$	737.17	Aug. 5, 1921	12.16
\$1000	St. Paul 4's—1925.	76 $\frac{3}{8}$	769.69	Aug. 5	12.16
\$2000	International Tel. Sales & Eng. 6-1924.	75 $\frac{1}{2}$	1,519.32	Aug. 6	11.16

Of all the securities above listed, Irving Whitehouse Company owned only the following, which sold at the price set out below:

15 Royal Dutch.....	\$762.63
50 Transcontinental Oil.....	375.50
10 American Can Company.....	263.10
333 Canadian Copper.....	12.77
Total	<u>\$1,414.00</u>

The rest belonged to customers of Irving Whitehouse Company, by far the greater amount being the property of marginal dealers. The following securities were the only ones that had been paid for in cash, the price that each brought on the forced sale appearing opposite the security:

25 Shares Pure Oil Stock.....	\$655.35
14 Shares U. S. Rubber.....	725.34
30 Shares General Motors.....	301.80
15 Shares St. Paul Common.....	404.03
10 Shares St. Paul Preferred.....	414.35
5 Shares Chicago Rock Island and Pacific "A".....	378.42
100 Shares Loewe's Theater.....	1,156.00
30 Shares Northern Pacific.....	2,296.80
10 Shares General Electric.....	1,173.10
Total	<u>\$7,505.19</u>

At the time of making each of said sales, Hutton & Co. passed the net sum realized from the sale to the credit of Irving Whitehouse Company on its books. These securities were held as collateral security for an indebtedness due Hutton & Co. from the bankrupt of \$37,690.01, and there was realized from the sale of all the securities \$48,155.28; after all of said sales had been made by Hutton & Co. the amount remaining of the money realized from the sales, after so satisfying Hutton & Co.'s claim, to wit; \$10,465.27 was transmitted to F. K. McBroom, Receiver. Thereafter certain other sums were received by McBroom, and upon the appointment of W. S. McCrea as trustee he was ordered to deduct from the amount he had on hand the receivership claims and expenses and turn the balance over to said McCrea. Pursuant to this order he delivered to said trustee the sum of \$15,149, which sum the trustee still has on hand, and it appears certain that the sums coming to the said McCrea in his capacity as trustee will not exceed \$30,000, from which he must deduct all proper expenses and preferred claims, including his and his attorneys' compensation, together with any sums found to be due these petitioners, before the balance may be turned over to the creditors. At no time after said receiver received the said \$10,465.27 did the amount of money in his hands fall below that amount until after he had turned over the funds in his hands to the trustee.

Most of the said claims, amounting to \$211,098.27 were due to the fact that the bankrupt had been paid

the purchase price in certain instances in full for the purchase of securities through Hutton & Co. which the bankrupt did not deliver, or that the claimants had ordered on margin to be purchased through Hutton & Co. stock or other securities and had put up collateral in the way of stocks or bonds with the bankrupt which the bankrupt either sold or deposited with Hutton & Co. as collateral for its account and such securities were sold by Hutton & Co. and no accounting had with the customer.

As to the various claims involved it should be remembered that each of these transactions followed in general outline the course of dealings described above, and that it is only the details of importance in each particular case that are set out here.

Oscar Lantor, represented by S. Edelstein as his counsel, on June 21, 1921, ordered through the bankrupt twenty (20) shares of Northern Pacific stock, and the said bankrupt for the purpose of filling said order, ordered the said stock in its own name through Hutton & Company, and the stock was bought by Hutton & Company for the credit of the bankrupt, and the purchase price charged to the bankrupt. The said order was by wire, and on the same day the said bankrupt advised the said Oscar Lantor by wire that it had purchased the said twenty (20) shares of Northern Pacific stock, and on June 24, 1921, the said Oscar Lantor remitted in full to the said bankrupt the sum of Thirteen Hundred Forty-eight and 50/100 (\$1348.50) dollars in payment of said stock, and on June 25, 1921, the said bankrupt acknowledged the receipt of the re-

mittance, and in said acknowledgment advised the said Oscar Lantor that the twenty (20) shares of Northern Pacific stock was ordered transferred in the name of the said Oscar Lantor. On June 30, 1921, the bankrupt ordered the said twenty (20) shares of Northern Pacific stock through Hutton & Company to be transferred in the name of the said Oscar Lantor, but said telegram was either missent or was miscarried, but there is no evidence Hutton & Co. received such order. On several occasions prior to August 3, 1921, the said Oscar Lantor called upon the said bankrupt for his stock and was advised that the same was being transferred. On July 18, 1921, the said bankrupt wired Hutton & Company inquiring why said stock had not been transferred in accordance with their message of June 30, 1921, at which time Hutton & Co. notified the bankrupt that the order of transfer had never been received. The said Oscar Lantor had no account with the said bankrupt prior to the transaction mentioned, never authorized the said bankrupt to hypothecate said stock with Hutton & Company nor to deal with said stock. The said Oscar Lantor had no knowledge that the said stock was being held by Hutton & Company for collateral for any indebtedness due it from the said bankrupt. The said bankrupt at divers times promised to have the transfer of said stock made in the name of Oscar Lantor, but such transfer was never made nor the stock delivered to the said Oscar Lantor up to the time of the appointment of said receiver.

David Ackerman, represented by Wakefield & Witherspoon, being the owner of one hundred (100) shares of Loew's Theatre stock, prior to August 3, 1921, delivered said stock to the bankrupt under an agreement whereby the bankrupt was to loan said stock on behalf of said claimant to E. F. Hutton & Co. to be used by said E. F. Hutton & Co. as collateral for its loans in New York, with the understanding between said bankrupt and said claimant that said Hutton & Co. would pay the claimant the prevailing call money rate of interest thereon. The referee specifically finds that said claimant did not authorize the bankrupt to pledge said stock with Hutton & Co. as collateral for the bankrupt's account; that the bankrupt did deposit said stock with Hutton & Co. as collateral for bankrupt's account, and the said stock was never returned to the claimant; that said stock was in the possession of Hutton & Co. at the time of the appointment of the Receiver for the bankrupt by the Superior Court of Spokane County, Washington, and was sold by Hutton & Co., with other stock to liquidate the bankrupt's indebtedness to it, as referred to elsewhere in these findings.

Stanley Hodgman, represented by Wakefield & Witherspoon, on July 11, 1921, placed an order with the bankrupt for 5 shares of Chicago, Rock Island Pacific Preferred "A" 7% stock, and before the appointment of the receiver had fully paid for and demanded delivery of said stock. That upon the said order being placed the bankrupt on July 14, 1921, placed an order for the said stock for the

purpose of complying with its contract with Hutton & Co., which last mentioned company purchased the said stock on said order at the price, with commission, of \$366.63; the said stock being purchased for the account of bankrupt and the purchase price charged against the bankrupt, but said stock was never delivered to the claimant.

Hazel Mowers, represented by Graves, Kizer & Graves, on or about February 16, 1921, delivered to Irving Whitehouse Company one \$1,000 Chicago, Milwaukee & St. Paul bond bearing interest at 4% per annum and maturing in 1925, and instructed the Company to sell the same. Later on, or about March 7, 1921, she ordered the bankrupt to purchase for her one \$1,000 Chile Copper bond bearing interest at 6%, maturing in 1932. Thereafter, in April of 1921, she ordered five shares United States Rubber Company stock, five shares of Canadian Pacific Railway Company and two shares of American Agricultural Company stock. These last mentioned securities, together with the Chile Copper Company bond, were purchased on the installment plan, but Miss Mowers desired delivery of the shares of stock last mentioned and therefore placed with Irving Whitehouse Company as collateral security one \$1,000 Chicago, Rock Island & Pacific Bond, one \$1,000 Chicago, Milwaukee & St. Paul bond maturing in 1932, and one \$1,000 Chesapeake & Ohio bond, agreeing that the Company might hold the same, together with the Chile Copper Company bond above referred to, as collateral security for the amount remaining due on

the aforesaid shares of stock. Irving Whitehouse Company thereafter pledged all the above securities, including the Chicago, Milwaukee & St. Paul bond delivered for sale, with Hutton & Co. Petitioner Mower made various payments and received delivery of the American Agricultural Company and the Canadian Pacific Railway Company stock. On July 27, 1921, she still owed Irving Whitehouse Company the sum of \$1837.90, and the Company was holding in pledge with Hutton & Co. the aforesaid bonds and also five shares of United States Rubber and five shares of Northern Pacific Railway. On that date, the Bankrupt instructed Hutton & Co. to sell the following bonds belonging to this petitioner; the \$1,000 Chesapeake & Ohio bond, the \$1,000 Chicago, Rock Island & Pacific bond, and the \$1,000 Chicago, Milwaukee & St. Paul bond maturing in 1932. The result of this sale was, if it may be applied to convert the debt of \$1837.90 previously owed by Hazel Mowers to a balance in her favor of approximately \$350. On the 3d day of August, 1921, the Bankrupt was holding in pledge with Hutton & Co. the following securities:

5 shares United States Rubber Co. stock.

5 shares United States Rubber Co. stoke.

1 \$1,000 Chicago, Milwaukee & St. Paul bond maturing in 1925.

1 \$1,000 Chile Copper Company bond maturing in 1932.

the last two being the identical bonds placed in pledge. These securities were sold in the manner described in the list set out above.

Mabel Connor, represented by Graves, Kizer & Graves, on or about April 13, 1921, ordered the company to purchase for her on the installment plan five shares of Northern Pacific Railway Company stock, and put up at that time as collateral one \$1,000 Chicago Railway Company bond. The bankrupt pledged both the shares of stock which were purchased and the bond with Hutton & Co., and thereafter, on July 27, 1921, wrongfully instructed Hutton & Co. to sell the aforesaid bond. As the result of such sale, if the proceeds may be so applied, the debt owned by Mabel Connor to the bankrupt was converted into a balance in her favor of approximately \$350. The five shares of Northern Pacific Railway Company stock were sold in the manner described in the list set out above.

Maude Mowers, represented by Graves, Kizer & Graves, on July 6, 1921, ordered the bankrupt to purchase for her twenty-three shares of stock of the Northern Pacific Railway Company and ten shares of stock of the Canadian Pacific Railway Company, and at the time paid the full purchase price. The Irving Whitehouse Company, however, failed to deliver such securities, but permitted them to remain in pledge with Hutton & Co. and allowed them to sell the Canadian Pacific Railway Company stock prior to August 3, 1921. The twenty-three shares of Northern Pacific Railway Company stock were sold in the manner described in the list set out above.

L. C. Ream, represented by Graves, Kizer & Graves, on July 6, 1921, ordered the Bankrupt to

purchase for him twenty-five shares of Pure Oil Company stock and paid a certain sum down, promising to pay the balance. On July 11, 1921, he paid this balance, and on July 12, 1921, ordered the bankrupt to purchase for him twenty-five additional shares of the same security, and at that time paid the full purchase price. The securities were all purchased through Hutton & Co. and were left in pledge with them by the bankrupt. They were sold in the manner described in the list set out above.

H. E. Woodland, represented by Graves, Kizer & Graves, on the 15th day of January, 1921, ordered the bankrupt to purchase for him fifteen shares of Northern Pacific Railway Company stock and paid part of the purchase price, promising to pay the balance. On July 8, 1921, he paid the balance due and requested delivery. Irving Whitehouse Company, however, permitted Hutton & Co. to retain the said Northern Pacific Railway Company stock in pledge, and these securities were sold in the manner described in the list set out above.

T. S. Lane, represented by Allen, Winston & Allen, being the owner of a \$2,000 International Tel. Sales and Eng. 6% bond due in 1924, a long time prior to August 3, 1921, delivered said bond to the bankrupt together with other securities as collateral security for a marginal account which said Lane had with the bankrupt. Prior to August 3, 1921, the bankrupt had converted securities which had been ordered by said Lane and collateral which had been delivered to the bankrupt as col-

lateral security for Lane's account to an extent that the debit balance of said Lane on his marginal transaction had been changed into a credit balance in favor of said Lane. Long prior to said August 3, 1921, the bankrupt had in turn placed said \$2,000 bond with E. F. Hutton & Company as collateral security for the bankrupt's account with said Hutton & Company, and said bond remained with said Hutton & Company until after the receiver was appointed on August 3, 1921, and was sold as shown above, the amount realized from said sale being \$1519.32.

On January 4, 1923, said Lane filed with the Referee in Bankruptcy his claim against the bankrupt estate in the sum of \$43,718.87; on January 9, 1922, said Lane filed his amended claim with the Referee in the sum of \$103,689.87; on October 16, 1922, the Referee made an order regarding the recasting of claims, the effect of which was that the securities should be figured as of their value on August 3, 1921, unless the claimant should be able to show that they were converted at an earlier date, and would then be entitled to place the values as of the date of the conversion; on November 14, 1922, the said Lane filed with the Referee his second amended claim in the sum of \$85,530.06; heretofore a dispute arose between said Lane and the Trustee in Bankruptcy regarding a preference which the Trustee claimed had been received by said Lane in the sum of \$6700; this dispute was settled by the execution of a written agreement between Lane and the Trustee that said Lane should

pay to the Trustee \$5700, and that the claim of said Lane against the bankrupt estate was assigned as collateral security to secure the payment of said sum of \$5700. This claimed preference of \$6700 arose out of the fact that immediately prior to the appointment of the Receiver in the state court, the bankrupt, without said Lane's knowledge, caused said sum to be deposited in a New York bank to the credit of said Lane; prior to the failure said Lane had given to the bankrupt a note for \$7,000 executed by him for which he received no consideration, and this note was pledged by the bankrupt with the Fidelity National Bank with other securities for an obligation due from the bankrupt to said bank; had said transfer of money not been made the result would have been that the debt due from the bankrupt to the Fidelity National Bank would have been reduced by the money so deposited to the credit of said Lane. The \$2,000 debenture of the International Tel. Sales and Eng. Co. was included in each of the claims filed by said Lane with the Referee, the claimant claiming an indebtedness due to the conversion of said debenture.

F. D. Allen, of counsel for said Lane, on or about October 17, 1922, received from the Referee a copy of the order of October 16, 1922, above referred to; he thereupon proceeded to investigate to determine the date of the conversion of the securities of said Lane, and then discovered that said debenture had been sold in the manner and at the time shown above; he communicated this information to said Lane who then, for the first time, had actual knowl-

edge of the facts as to the time and manner when said debenture was sold or had gone into the hands of the Receiver.

Irving Whitehouse, the president of the bankrupt, had been employed by said Lane in business enterprises in Butte, Montana, some years prior to August 3, 1921, had after the bankrupt had commenced operations in New York traded with it extensively; about the Friday preceding the appointment of the Receiver, checks drawn by the bankrupt company were dishonored, information of this fact was given to F. D. Allen, one of the bankrupt's attorneys; as a result thereof a conference was held in which said Lane either participated or of which he had knowledge, and as a result thereof an investigation was then made and conference had with certain accountants of the bankrupt, with the result that prior to the time of the failure said Lane knew that the bankrupt was hopelessly insolvent and that it had been kiting checks; that it had an overdrawn bank account, and that it had pledged and sold large amounts of the securities of its customers; claimant further went to the Fidelity National Bank and made investigation there as to the status of the bankrupt's account, ascertaining that it was overdrawn to the extent of about \$20,000 and that large amounts of securities belonging to said Lane and other customers had been pledged, and many of them sold. Said Lane is a man of wide experience and had he gone to the books of the bankrupt corporation he could have discovered with but little difficulty the fact that the debenture in

question was in the possession of Hutton & Company, as security for Hutton's advances to the bankrupt, and had not been sold prior to the time of the appointment of the Receiver. Said Lane has filed with the Referee his consent that in passing upon his claim for reclamation of said fund, that the Referee may make such order as will do equity herein.

Charles Theis, represented by Fabian B. Dodds, prior to April 10, 1921, ordered through the bankrupt, 30 shares of American Hide & Leather, preferred, and one I. L. Flagler ordered through the Bankrupt 10 shares of the same stock; the bankrupt in turn ordered this stock through Hutton & Company, and the stock was purchased by Hutton & Company on the order of the bankrupt. On May 10, 1921, Hutton & Company held 40 shares of this stock for the account of bankrupt, and there were no other customers of the bankrupt who were long on this stock at the time the Receiver was appointed August 3, 1921, and the bankrupt owned no Hide & Leather stock except that held with Hutton & Company. On May 10, 1921, 25 shares of the said stock was sold by Hutton and Company on the order of the bankrupt, and the proceeds converted by the bankrupt; the remainder of 15 shares continued to be held by Hutton & Company until after the Receiver was appointed in the said court, and was sold as shown above, and in point of time as to the other securities as shown elsewhere in this stipulation. On August 3, 1921, at the time the Receiver was appointed,

said Theis and said Flagler had a credit balance on the books of the bankrupt due to the conversion of their securities. I. L. Flagler has not appeared in this special proceeding in any manner whatever.

H. Sidney Collins, represented by John King, on July 8, 1921, ordered through the bankrupt 10 shares of American Telephone and Telegraph Co. stock, and paid in full for same. The bankrupt in turn, for the purpose of performing its contract with Collins, ordered the said stock through Hutton & Company, and it was purchased by Hutton & Company. On August 2, 1921, prior to the appointment and qualification of the Receiver Hutton & Company on the order of the bankrupt sold all American Telephone and Telegraph stock which it held for the bankrupt and applied the proceeds toward the liquidation of the indebtedness due it from the bankrupt for which the stock was held as collateral.

On or about July 19, 1921, Augusta W. Howell placed an order with Irving Whitehouse Company for ten (10) shares of General Electric Company stock, and was charged by Irving Whitehouse Company with the full purchase price thereof with commissions, amounting to Eleven Hundred Ninety-one (\$1191.00) Dollars. Immediately thereafter said Irving Whitehouse Company in compliance with said order, bought from Hutton & Company, its New York correspondent, for said Augusta W. Howell ten (10) shares of said General Electric Company stock. On July 26, 1921, said Augusta W.

Howell paid said Irving Whitehouse Company said sum of Eleven Hundred Ninety-one (\$1191.00) Dollars, which paid for the said stock in full, and directed said Irving Whitehouse Company to deliver said stock to petitioner. On the 3d day of August, 1921, Hutton & Company held for the account of the bankrupt ten (10) shares of said General Electric Company stock. Hutton & Company also held for the account of the bankrupt one and two-hundredths (1.02) shares of General Electric stock purchased for another customer who had ordered one and two-hundredths (1.02) shares from bankrupt. There were no other customers in General Electric Stock, and the bankrupt was not carrying any of such stock for its own account.

Said Augusta W. Howell filed a claim for said sum with the Receiver in said Superior Court and also filed a claim for said sum in the above-entitled court. Prior, however, to filing either of said claims, and on or about the 2d or 3d day of August, 1921, Mr. Kimmel and Mr. Blum of the Union Trust Company, acting for Miss Howell, went to the office of the Irving Whitehouse Company and asked whether the bankrupt had purchased the stock so ordered, and were informed and understood that such stock had not been ordered and was not on hand, and said claims were filed by said Augusta W. Howell with that understanding and belief. Upon discovery of the facts and on or about November 1, 1922, and prior to the declaration of any dividend by the bankrupt's estate, filed her withdrawal of her claim as a creditor for money paid

(Testimony of Alexander Stephens.)

the bankrupt, and has never received any dividend as a general creditor for money paid the bankrupt, and has never received any dividend as a general creditor, and has elected to stand upon her petition to reclaim the proceeds of the stock.

As to Alexander Stephens, represented by McCarthy, Edge & Lantz, the facts were as follows:

Testimony of Alexander Stephens, for Plaintiffs.

ALEXANDER STEPHENS testified substantially as follows:

“I had a balance on deposit with Irving Whitehouse Company for some five or six months prior to January 5, 1921, amounting to \$465.00. On that date I went to the Irving Whitehouse Company and asked them to purchase for me such amount of the New Cornelia stock as my money on deposit would pay for in full. They figured it up for me and said that my money would purchase thirty shares and leave a balance of about \$15.00. I do not remember giving any written order, or any order whatever, or for any fixed number of shares, but I understood that I was to get 30 shares.

“A few days later they sent me a statement or told me that they had purchased on my account 30 shares of the stock, and that on account of change in price that the purchase, including their commission, amounted to \$15.50 more than my money. I disputed this and doubted that they had paid such price and requested that proofs be submitted that they had paid for the stock the price they claimed, and they promised to supply same, but

(Testimony of Alexander Stephens.)

never did so. The matter was simply let drag along and I never demanded my money back or in any way repudiated the transaction and never demanded the delivery of the stock. I was billed for the balance of \$15.50, with interest thereon, monthly by the Irving Whitehouse Company until the time of the receivership and bankruptcy, and herewith submit a sample of one of the bills or statements referred to above. They told me when I purchased the stock that it was a stock which could not be purchased on a margin and that it would have to be paid for in full purchase price when purchased, and I understood that it was not a marginal transaction. I am willing to pay the \$15.50 balance with interest thereon, or permit it to be deducted from a distribution to me in accordance with my petition herein."

Testimony of J. C. Bird, for Plaintiffs.

Mr. J. C. BIRD, accountant for bankrupt, testified substantially as follows.

"That on or about January 5, 1921, another employee of Irving Whitehouse Company brought me an order for 30 shares of New Cornelia stock which I immediately executed. The price paid including the commission actually was \$15.50 more than the money Mr. Stephens then had on deposit. It is the custom of brokers to take orders for specific numbers of shares, and we cannot execute an order in New York except for a definite number of shares. I would not consider this a marginal transaction

(Testimony of J. C. Bird.)

as it was about fully paid for and the amount had no relation to the market fluctuations, but our practice was to carry as a marginal transaction any stock on which there was some balance due, no matter how small, and we consider we had the right to hold stock purchased in pledge until the full purchase price was paid, and this was the way in which we carried this transaction and is the general custom of stock brokers. The New Cornelia transaction had with Mr. Stephens was the only transaction which was ever had with Irving Whitehouse Company by Mr. Stephens or anyone else with reference to that class of stock, and the stock purchased was for the account of Mr. Stephens.

As to the claimant O. W. Wittmer, represented by E. B. Quackenbush, the facts were as follows:

Testimony of O. W. Wittmer, In His Own Behalf.

O. W. WITTMER, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. QUACKENBUSH.)

Q. Mr. Wittmer, you may state how this account was handled with Hutton & Co., through the Whitehouse Co.?

A. Well, this Middlestates Oil, a hundred shares of it, was purchased through Wolff & Co., of New York, and it was purchased on deposit of \$780.00 worth of German Government bonds as collateral.

(Testimony of O. W. Wittmer.)

That account was afterwards transferred to Hutton & Co., through Irving Whitehouse dealing with me, and immediately after the account was transferred Whitehouse Co. notified me that Hutton would not accept German Government bonds as collateral for the account, and in lieu thereof I put up cash to the extent of —. I made three payments, \$250.00 at one time, \$100.00 at another, and \$150.00 at another. My arrangement with Whitehouse & Co. was on what they call a payment plan, not a marginal account in which a man signs a release of the stock he buys; no release of that kind was ever signed.

Q. Did you over consent to—?

A. No, sir.

Q. —the use of your securities for any other purpose?

A. No, sir; I told them very emphatically before the account was transferred that I wanted to make it absolutely safe it would not be sold out, and that was the stipulation and the agreement. On the payment of the last amount of money that receipt and agreement was prepared and handed to me.

Q. Did you ever consent at any time to Whitehouse obtaining possession of these bonds?

A. No, sir.

Q. That is, the German Government bonds, 60,000?

A. No, sir.

Q. When did you first know he had taken possession of them?

(Testimony of O. W. Wittmer.)

A. I did not know anything about it until I got back here after the failure had occurred.

Q. What time was that?

A. I came back about the latter part of August.

Q. When did you leave here?

A. I left here the 25th day of May.

Q. Immediately when you got that information did you make an effort to get these bonds?

A. I most certainly did.

Q. Where did you find they were?

A. Well, for a long time I did not find out about them, except everything was on—

Q. Did you ever go over to their office to try to find out?

A. Yes, sir.

Q. Did you get the information?

A. Finally I got the information from Mr. Byrd.

Q. What did you do in an effort to get them?

A. We entered suit.

Q. First did you make an effort to get them from the bank?

A. I wrote to the bank and they informed me—

Mr. WILLIAMS.—Just a moment. I object to that as hearsay, and further it is not the best evidence.

The WITNESS.—What do you mean, Mr. Williams?

Mr. WILLIAMS.—That is, what the bank may have said to you by letter is not the best evidence.

The REFEREE.—Sustain the objection.

(Testimony of O. W. Wittmer.)

Mr. QUACKENBUSH.—Did you make a demand on the bank for these bonds?

A. Yes, sir.

Q. Did they give them to you?

A. No, sir.

Q. And later what did you do?

A. I gave them even the numbers of each bond.

Q. Did they have those bonds?

A. Yes, sir, they admitted they had them.

Mr. WILLIAMS.—I move to strike out that as hearsay, what they admitted.

The REFEREE.—Well, Mr. Byrd testified they had them.

Mr. WILLIAMS.—Yes, there is no doubt about that.

Mr. QUACKENBUSH.—Were you ever able to get possession of the bonds?

A. No, sir.

Q. What else did you do towards getting them?

A. Well, I instituted suit against them and made every effort to get them without letting it go to suit.

Q. Found out eventually you had to abandon it because they had a claim you could not beat?

Mr. WILLIAMS.—Just a minute. I object to that as a conclusion.

Mr. QUACKENBUSH.—Why did you abandon the suit?

A. Principally because they held them and did not acknowledge my rights in there, said they were put up by Irving Whitehouse.

(Testimony of O. W. Wittmer.)

Mr. WILLIAMS.—I object to that as hearsay.

The REFEREE.—Sustain the objection.

Mr. QUACKENBUSH.—You have never been able to recover them?

A. No, sir, I have not been able to recover them.

Q. Now, state the condition of the account from that time on, from the time you paid \$250.00 as you know it to be.

A. Well, I only know what the books showed. The books showed that fifty shares of the stock had been—

Mr. WILLIAMS.—We have already got that in evidence.

Mr. QUACKENBUSH.—Do you know what the value of the bonds were on June 10, 1921?

A. Yes, sir.

Q. What was it?

Mr. WILLIAMS.—I think I will object to this witness testifying; he has not shown himself qualified to testify.

The WITNESS.—That is what you had this gentlemen here to testify.

Mr. QUACKENBUSH.—Did you look up the market reports of those bonds for the month of June to-day, or of the marks?

A. Yes, sir; I went down to the library this morning and they would not let me take the large books on which these were away from the library, so I copied them under dates of June 10 to June 15th.

Q. What were those books?

(Testimony of O. W. Wittmer.)

Mr. WILLIAMS.—Just a moment. May I see your figures before I object?

The WITNESS.—Yes, that is per thousand.

Mr. WILLIAMS.—I object to it as not being the best evidence. I do not want to be technical about it, but we have not those papers here to see what they show the condition of them.

The REFEREE.—There is nothing I can do but sustain the objection.

The WITNESS.—Mr. Mallette, who was just here, said that the record show from the 5th of June to the 16th of June, they varied from 16 down to 12½.

Mr. WILLIAMS.—I object to what Mr. Mallette said.

Mr. QUACKENBUSH.—What did you take those off of, Mr. Wittmer?

A. The New York Times.

Q. The New York Times?

A. Yes, sir.

Q. The general market reports as made on those dates in the New York Times.

A. Yes, sir. From each paper each day.

Q. Are those figures you have there a correct transcription of them?

The REFEREE.—I have sustained objection as to his testimony as to that.

Mr. QUACKENBUSH.—I understood here we could use the books or papers.

Mr. GRAVES.—He cannot testify.

(Testimony of O. W. Wittmer.)

Mr. QUACKENBUSH.—Refreshing your memory from the market reports as you know them to be, you may state if you know what the prices of those German marks were on the 10th day of June.

Mr. WILLIAMS.—Just a minute. I object. The report he has seen in the paper would be the best evidence, not his recollection of what it was.

The REFEREE.—There is no doubt about that.

Mr QUACKENBUSH.—Can we use the Review?

Mr. WILLIAMS.—I won't object to the Review.

Mr. QUACKENBUSH.—Now, Mr. Wittmer, at any time did you sign any document or contract or paper or anything of that kind authorizing Whitehouse or Hutton to dispose of these bonds, or of the Middlestates Oil stock?

A. No, sir; there was no release given or anything of the kind.

Q. Did you sign the ordinary purchaser's contract with Whitehouse?

A. No, sir.

Q. Or with Hutton & Co. from them?

A. No.

Mr. GRAVES.—What do you mean by ordinary purchaser's contract?

Mr. QUACKENBUSH.—That is where they sign the right to hypothecate and all that.

Mr. GRAVES.—There is no contract of that kind except the taking of the receipt.

The WITNESS.—Well, that is on the receipt.

Mr. GRAVES.—There is no contract signed at

(Testimony of O. W. Wittmer.)

the time that the customer goes in and opens his account with them?

The WITNESS.—When he purchases without paying for them, there always is.

Mr. McCARTHY.—When he buys on a margin, there always is.

Cross-examination.

(By Mr. GRAVES.)

Q. Now, at this time this was the only agreement, this embodies all of the agreement entered into between yourself and Irving Whitehouse Company? I am referring to Wittmer's Exhibit 3.

A. That is the only written agreement, yes, sir.

Q. Any oral agreement you entered into was made at the same time or about the same time?

A. Well, practically the same thing; the account was transferred a little before that.

Q. Any oral agreement you made was made prior to the date of this written agreement?

A. Yes, sir.

Q. There was no oral agreement subsequent to the date of this?

A. No, sir.

Q. At all times you were indebted on your installment transaction for the purchase price of these one hundred Middlestates Oil up to the 3d of August, 1921?

A. Not according to their books, no, sir; according to their statement, I was.

Q. As I say, you had never paid the full pur-

(Testimony of O. W. Wittmer.)

chase price of these Middlestates Oil up to the 3d day of August, 1921?

A. No, sir.

Q. And before that time you were indebted to the Whitehouse Company in the amount remaining over these installments that you had paid from month to month?

A. Well, I want to answer that question right, but according to their records I was not in debt to them, but not according to their statement, I was.

Q. Well, had you prior to the 3d day of August, 1921, paid the full purchase price of 100 Middlestates Oil to Irving Whitehouse Company?

A. No, sir.

Mr. GRAVES. All right.

Redirect Examination.

(By Mr. QUACKENBUSH.)

Q. Did you know they had converted your German marks before the 3d of August?

Mr. WILLIAMS.—I object to that as a conclusion.

A. No.

Mr. QUACKENBUSH.—Did you know that Irving Whitehouse had taken possession of these German government bonds and applied them on his own account to the National City Bank of Seattle?

Mr. GRAVES.—I object, that is incompetent, irrelevant and immaterial. Under the custom proved the broker may pledge any securities that are up on a marginal transaction in any way that he wants, but it makes no difference whether Mr. Wittmer

(Testimony of O. W. Wittmer.) *

knew they were dealing in these securities in the manner in which they were entitled to.

Mr. QUACKENBUSH.—They could not transfer it and not give him credit for it.

Mr. GRAVES.—Your Honor will take judicial notice.

The REFEREE.—I know that is the general custom.

Mr. QUACKENBUSH.—When you say you owed him, do you take into account the proceeds of any of this collateral of yours? A. Absolutely not.

Mr. GRAVES.—I object, that is incompetent, irrelevant and immaterial.

The REFEREE.—What was that question? (Question read.)

Mr. GRAVES.—I object on the ground that it is incompetent, irrelevant, and immaterial. We are trying to ascertain the true basis or the true outlines of the account between Mr. Wittmer and Irving Whitehouse Co. and he may not take credit for any stuff he has put up there for collateral.

The REFEREE.—Let him answer, whether it is material or not. I will decide later, but he is going away so he may answer.

A. (Answer read.)

Mr. QUACKENBUSH.—That is all.

Mr. GRAVES.—That is all.

Witness excused.

Testimony of J. C. Byrd, for Plaintiffs (Recalled).

J. C. BYRD testified as follows:

“Mr. Wittmer had carried on an account with Wolf & Company of New York, and at the time of the transfer of his account to Hutton & Company was indebted to Wolf in the sum of approximately \$1,400.00 to secure which Wolf held as collateral 100 shares of Middlestates Oil and German government bonds for 60,000 marks. He caused this account to be transferred from Wolf & Company to Hutton & Company through the agency of Irving Whitehouse Company. The transaction was consummated by Hutton & Company paying the debit balance due to Wolf & Company and charging Irving Whitehouse Company with the amount so paid. Irving Whitehouse Company, in turn, charged Wittmer for the same amount. The collateral carried with Wolf & Company was turned over to Hutton & Company, but Hutton & Company refused to carry the 60,000 government bonds because of the weakness of the market. Wittmer was a marginal dealer, and both the Middlestates Oil and the 60,000 government bonds were held as collateral by Irving Whitehouse Company on his account and the German bonds were shown as collateral on the statements rendered him by Irving Whitehouse Company. The bonds were shipped to Spokane after Hutton & Company refused to hold them, and were pledged by Irving Whitehouse Company on its own account with the

(Testimony of J. C. Byrd.)

National City Bank of Seattle some time in June of 1921. Wittmer did not sign the usual contract signed by customers of Irving Whitehouse Company, nor any other contract or agreement with Whitehouse & Company. Wittmer's exhibit 3 is a receipt for \$250.00 paid by him to cover five monthly payments of \$50.00 each, including all payments due up to and including the 15th of October, 1921. The receipt contains an agreement that the stock would not be closed out prior to that date. The only effect of this contract is to provide that if the market should fall greatly so that with the money put in Wittmer would still need more to make his margin, he would nevertheless not be sold out since he had paid ahead and would on that date make good what the market had lost. Disregarding any conversion of securities of Wittmer, the amount he owed Irving Whitehouse Company on August 3, 1921, was \$855.69; 50 shares of Middlestate Oil belonging to Wittmer had, however, been sold by Irving Whitehouse Company prior to that date for \$553.00, so that if he received credit for such sale he would still be indebted to Irving Whitehouse Company in the sum of \$300.00 disregarding any questions of the conversion of the German bonds. It is the custom in all marginal transactions carried on between the broker and his customer that the broker may rehypothecate any securities which he holds on the customer's account so long as the customer remains indebted to him. Neither Irving Whitehouse Company nor any of its cus-

tomers, with the exception of Mr. Wittmer, were at the time of the failure long in Middlestates Oil, and there were at that time 521½ shares of that stock carried by Hutton & Company on the Irving Whitehouse account which appear to be some of the identical shares which were transferred from Wolf & Company to Hutton & Company."

Whereas, on or about September 29, 1922, the referee on the petitions of the claimants David Ackerman, Stanley Hodgman, L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Oscar Lantor and Maude Mowers made an order on the facts relating to such claimants above set forth, which order has been certified to the District Court for review, but has not been passed upon, and it is the desire to have the rights of all the claimants named in this stipulation disposed of by one order, subject to review. It is further agreed by said David Ackerman, Stanley Hodgman, L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Oscar Lantor, Maude Mowers and the Trustee that the said previous order of the referee may be set aside and vacated and for naught held, and that the whole matter shall now be disposed of in one order, subject to review, and if in order to carry out the purpose it is necessary that the District Judge shall make an order cancelling the said previous order made by the referee, that such course shall be taken.

Dated this —— day of April, 1923.

WAKEFIELD & WITHERSPOON,
Attorneys for David Ackerman, Stanley Hodgman
and Augusta W. Howell.

GRAVES, KIZER & GRAVES,
Attorneys for L. C. Ream, Hazel Mowers, Mabel
Connor, H. E. Woodland and Maude Mowers.

S. EDELSTEIN,

Attorney for Oscar Lantor.

FABIAN B. DODDS,

Attorney for Charles Theis.

McCARTHY, EDGE & LANTZ,

Attorneys for Alexander Stephens.

ALLEN, WINSTON & ALLEN,

Attorneys for T. S. Lane.

E. QUACKENBUSH,

Attorney for O. W. Wittmer.

_____,

Attorney for H. Sidney Collins.

DANSON, WILLIAMS & DANSON,

Attorneys for W. S. McCrea, Trustee.

V.

That said order of the District Judge was and is erroneous in the matter of law in that the Court erred as follows:

1. In reversing the order of the Referee.
2. In refusing to affirm the order of the Referee.
3. In adjudging the Bankrupt or the Trustee entitled to any portion of said fund until after these claimants had been paid in full.
4. In failing and refusing to order said fund to

be the property of said claimants so far as necessary to pay them in full.

5. In failing and refusing to order all other claimants estopped from claiming any part of said fund.

6. In failing and refusing to hold said show cause order and the proceedings thereunder barred any other claimants to any part of said fund.

7. In failing and refusing to order that the said Trustee had no property right in said fund.

8. In failing and refusing to order the entire indebtedness of Hutton & Company to be paid from any interest the Bankrupt or the Trustee might have in said securities, or any of them.

9. In ordering these claimants, or any of them, to pay any of the sum due Hutton & Company.

10. In ordering the interest of these claimants in said fund, or any part thereof, to be subject to the claim of Hutton & Company.

11. In ordering the interest of said claimants, or any of them, to be prorated according to ownership in each security after deducting any indebtedness, or to be prorated at all.

12. In failing and refusing to award to those claimants who identified their particular securities among those held in the Hutton & Company pledge the amount obtained for such securities on their sale.

13. In failing and refusing to award claimants who identified in the Hutton & Company pledge securities similar to those which the bankrupt was under obligation to be holding for them, the full value of such a proportion of the identified securities

as the number of shares each of such claimants were entitled to bore to the total amount of such shares that the bankrupt was under obligation to be holding for all his customers.

WHEREFORE your petitioners, feeling aggrieved because of such order, ask that the same may be revised in matter of law by your Honorable Court as provided in Section 24-b of the Bankruptcy Act of 1898, as amended, and the rules and practice in such case provided.

GRAVES, KIZER & GRAVES,

Attorneys for L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland and Maude Mowers.

S. EDELSTEIN,

Attorney for Oscar Lantor.

FABIAN B. DODDS,

Attorney for Charles Theis.

McCARATHY, EDGE & LANTZ,

Attorneys for Alexander Stephens.

E. B. QUACKENBUSH,

Attorney for O. W. Wittmer.

ALLEN, WINSTON & ALLEN,

Attorneys for T. S. Lane.

WARFIELD & WITHERSPOON,

Attorneys for David Ackerman, Stanley Hodgman and Augusta W. Howell.

State of Washington,
County of Spokane,—ss.

L. C. Ream, being first duly sworn, deposes and upon his oath says: I am one of the petitioners above-named; I have read the foregoing petition and the statements of fact therein contained are

true according to the best of my knowledge, information and belief.

L. C. REAM.

Subscribed and sworn to before me this 4th day of August, 1923.

[Seal]

M. M. ELLIOTT,

Notary Public in and for the State of Washington,
Residing at Spokane.

In the United States District Court for the Eastern
District of Washington, Northern Division.

No. 3812—IN BANKRUPTCY.

In the Matter of IRVING WHITEHOUSE COM-
PANY,

Bankrupt.

Order on Review of Referee's Decision.

This cause came on regularly for hearing before the undersigned, one of the Judges of the above court, on the petition of the Trustee for a review of the order made by the Hon. Sidney H. Wentworth, Referee of this court, on the petitions of David Ackerman, Stanley Hodgman, L. C. Ream, Hazel Mowers, Mable Connor, H. E. Woodland, Oscar Lantor, Maud Mowers, Chas. Theis, Alexander Stephens, Augusta W. Howell, Thaddeus S. Lane and O. W. Wittmer, for an order directing the Trustee in Bankruptcy to deliver to said petitioners certain securities, or the proceeds real-

ized therefrom, the Trustee W. S. McCrea appearing by his attorneys Danson, Williams & Danson, the petitioners L. C. Ream, Hazel Mowers,, Mable Connor, H. E. Woodland and Maud Mowers appearing by their attorneys Graves, Kizer & Graves, the petitioner Oscar Lantor appearing by his attorney S. Edelstein, the petitioner Chas. Theis appearing by his attorney Fabian B. Dodds, the petitioner Alexander Stephens appearing by his attorneys McCarthy, Edge & Lantz, the petitioner O. W. Wittmer appearing by his attorney, E. B. Quackenbush, the petitioner Thaddeus S. Lane appearing by his attorneys Allen, Winston & Allen, and the petitioners David Ackerman, Stanley Hodgman and Augusta W. Howell appearing by their attorneys Wakefield & Wither-spoon, and the court having heard the arguments and having taken the cause under advisement, and having heretofore, and on July 18, 1923, filed its decision in writing, and being now fully advised in the premises,

IT IS ORDERED, that the said order of the said Referee be, and the same is reversed and set aside and the Referee is directed to make computations and order of allowance as follows: From the indebtedness due from the bankrupt to E. F. Hutton & Co., for which the securities sold after August 3, 1921, were held as collateral, there be deducted \$1,414, the amount realized from the sale of the securities owned by the bankrupt and to which the bankrupt's customers had no claim; that thereafter there be applied to the payment of the indebtedness

due to Hutton & Co. from the proceeds realized from the sale of all the remaining securities, a *pro rata* share from all such securities so far as necessary to the satisfaction of the Hutton & Co. claim. If the interest of the bankrupt in any particular security is not sufficient to pay the *pro rata* indebtedness of such security to Hutton & Co. the deficiency thereof be supplied from the interest of the owners of the remaining of such security, but if the interest of the bankrupt is sufficient to pay the *pro rata* indebtedness of such security then the balance of the remaining of the proceeds realized from the sale of each security be ordered paid to any petitioner owning such security, according to his ownership, and where there are several owners to a particular security, that the balance to the credit of such security be prorated according to such ownership, after deducting any indebtedness due from such owners for the purchase of such security.

IT IS FURTHER ORDERED, That none of the said petitioners are estopped from asserting their claim through having filed general claims.

Dated this 28th day of July, 1923.

JEREMIAH NETERER,
District Court Judge.

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 3812.

In the Matter of IRVING WHITEHOUSE COM-
PANY,

Bankrupt.

Order Directing Delivery of Money to Petitioners.

In the petitions of David Ackerman, Stanley Hodgman, L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Oscar Lantor, Maud Mowers, Charles Theis, Alexander Stephens, Augusta W. Howell, Thaddeus S. Lane, O. W. Wittmer and Sidney H. Collins.

A consolidated hearing of the claims of the above petitioners was made before me on a stipulation of fact entered into between these petitioners and W. S. McCrea, as Trustee in Bankruptcy, the petitioners being represented by their respective counsel, and the Trustee by his, and from the record herein it appears that W. S. McCrea, as Trustee in Bankruptcy, now has in his possession and wrongfully withholds from the petitioners whose names are set out below the sum of Ten Thousand Four Hundred Sixty-five and 27/100 (\$10,465.27) Dollars, which sum is composed of the proceeds of the sale of certain securities, many of which belonged to these petitioners; and that a notice has been duly published and an order duly entered to the effect that any person who had or

claimed to have any interest in this said fund should present his petition before the 5th day of February, 1923, or be estopped to set up any such claim; and that no persons other than the above petitioners have appeared in these proceedings; and that the aforesaid sum is insufficient to reimburse each petitioner in full for the loss sustained by the sale of his securities, but that the claim of O. W. Wittmer against this fund is inferior and subject to the claims of the other petitioners who are entitled to take priority over him in the distribution of said fund; and that the said fund now wrongfully withheld by the said W. S. McCrea from these petitioners should be distributed among them in the following manner, to wit:

David Ackerman	is entitled to the sum of	\$1156.00
Stanley Hodgman	is entitled to the sum of	369.71
L. C. Ream	is entitled to the sum of	655.35
Hazel Mowers	is entitled to the sum of	1936.36
Mabel Connor	is entitled to the sum of	169.50
H. E. Woodland	is entitled to the sum of	509.50
Oscar Lantor	is entitled to the sum of	673.00
Maud Mowers	is entitled to the sum of	775.10
Thaddeus S. Lane	is entitled to the sum of	1519.32
Charles Theis	is entitled to the sum of	760.28
Augusta Howell	is entitled to the sum of	1172.91
Alexander Stephens	is entitled to the sum of	384.92
Total		<hr/> \$10,081.95

It further appears that O. W. Wittmer is entitled to receive the balance remaining from such fund after the aforesaid sums have been distributed to the other petitioners. The amount he is, therefore, entitled to is \$383.32.

It further appears that the proceeds of the sale of the securities belonging to Sidney H. Collins are not included in this fund and that therefore this petitioner is not entitled to any sum whatever from said fund.

WHEREFORE, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED that said W. S. McCrea, as Trustee in Bankruptcy herein, deliver to the aforesaid petitioners the several sums set opposite their names and deliver to the said O. W. Wittmer the balance remaining over, to wit; the sum of \$383.32.

Dated this 27th day of April, 1923.

SIDNEY H. WENTWORTH,

Referee in Bankruptcy.

Copy rec'd Aug. 7, 1923.

DANSON, WILLIAMS & DANSON,

Attys. for Trustee.

[Endorsed]: In Bankruptcy—No. ——. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Irving Whitehouse Company, a Corporation, Bankrupt. L. C. Ream et al., Petitioners, vs. W. S. McCrea, as Trustee in Bankruptcy etc., Respondent. Petition to Revise in Matter of Law.

United States Circuit Court of Appeals for the
Ninth Circuit.

IN BANKRUPTCY—No. —.

In the Matter of IRVING WHITEHOUSE COM-
PANY, a Corporation, Bankrupt.

L. C. REAM, HAZEL MOWERS, MABEL CON-
NOR, H. E. WOODLAND, MAUDE
MOWERS, OSCAR LANTOR, CHARLES
THEIS, ALEXANDER STEPHENS, O. W.
WITTMER, T. S. LANE, DAVID ACKER-
MAN, STANLEY HODGMAN, AUGUSTA
W. HOWELL,

Petitioners,

vs.

W. S. McCREA, as Trustee in Bankruptcy of Irv-
ing Whitehouse Company, a Corporation,
Bankrupt,

Respondent.

Stipulation Re Petition for Revision.

IT IS STIPULATED by and between the parties
hereto that the record made up on appeal in the above-
entitled matter may be used and become a part of
the proceedings under the petition to revise in mat-
ter of law filed herein, in case this Honorable Court
should hold that the remedy is not by appeal, but by
petition to revise in matter of law.

Dated this 7th day of August, 1923.

DANSON, WILLIAMS & DANSON,

Attorneys for Respondent.

GRAVES, KIZER & GRAVES,

Attorneys for L. C. Ream, Hazel Mowers, Mabel

Connor, H. E. Woodland, and Maude Mowers.

S. EDELSTEIN,

Attorney for Oscar Lantor.

FABIAN B. DODDS,

Attorney for Charles Theis.

McCARTHY, EDGE & LANTZ,

Attorneys for Alexander Stephens.

E. B. QUACKENBUSH,

Attorney for O. W. Wittmer,

ALLEN, WINSTON & ALLEN,

Attorneys for T. S. Lane.

WAKEFIELD & WITHERSPOON,

Attorney for David Ackerman, Stanley Hodgman
and Augusta W. Howell.

[Endorsed]: In Bankruptcy—No. ——. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Irving Whitehouse Company, a Corporation, Bankrupt. L. C. Ream et al., Petitioners, vs. W. S. McCrea, as Trustee in Bankruptcy etc., Respondent. Stipulation.

United States Circuit Court of Appeals for Ninth
Circuit.

IN BANKRUPTCY—No. —.

In the Matter of IRVING WHITEHOUSE COM-
PANY, a Corporation, Bankrupt.

L. C. REAM, HAZEL MOWERS, MABEL
CONNOR, H. E. WOODLAND, MAUDE
MOWERS, OSCAR LANTOR, CHARLES
THEIS, ALEXANDER STEPHENS, O. W.
WITTMER, T. S. LANE, DAVID ACKER-
MAN, STANLEY HODGMAN, AUGUSTA
W. HOWELL,

Petitioners,

vs.

W. S. McCREA, as Trustee in Bankruptcy of Ir-
ving Whitehouse Company, a Corporation,
Bankrupt,

Respondent.

Notice of Filing Petition for Revision.

To W. S. McCrea, as Trustee in Bankruptcy of
Irving Whitehouse Company, a Corporation,
Bankrupt, and to Danson, Williams & Danson,
your attorneys:

YOU AND EACH OF YOU will please take
notice that on the 13th day of August, A. D. 1923 a
certain petition for revision under Section 24B of
the Bankruptcy Act of Congress approved July 1,
1898, of certain proceedings of the District Court
of the United States for the Eastern District of

Washington, Northern Division (a certified copy of which petition accompanies this notice and is served upon you herewith) was duly filed in said Circuit Court of Appeals; and the above mentioned matter is now pending in said court and, pursuant to the practice and agreeably to the stipulation filed will be regularly assigned for hearing or submission during the Seattle Session of said Court to be held in the City of Seattle, in the State of Washington, commencing on Monday, September 17th, 1923.

WITNESS THE HONORABLE THE JUDGES of the United States Circuit Court of Appeals for the Ninth Circuit, and the seal of said Circuit Court of Appeals at the city of San Francisco, in the State of California, this 13th day of August, A. D. 1923.

[Seal]

F. D. MONCKTON,
Clerk,
By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: No. 4075. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Irving Whitehouse Co., a Corporation, Bankrupt. Notice of Filing Petition for Revision. Filed Aug. 20, 1923, F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Copy of within notice of filing petition for revision accepted this 16th day of August, 1923.

DANSON, WILLIAMS & DANSON,

Attorneys for Trustee.

[Endorsed]: No. 4075. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Irving Whitehouse Company, a Corporation, Bankrupt. L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Maude Mowers, Oscar Lantor, Charles Theis, Alexander Stephens, O. W. Wittmer, T. S. Lane, David Ackerman, Stanley Hodgman, Augusta W. Howell, Petitioners, vs. W. S. McCrea, as Trustee in Bankruptcy of Irving Whitehouse Company, a Corporation, Bankrupt, Respondent. Petition for Revision. Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Eastern District of Washington, Northern Division.

Filed August 13, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of IRVING WHITEHOUSE COMPANY,
a Corporation, Bankrupt.

L. C. REAM, HAZEL MOWERS, MABEL CONNOR, H. E.
WOODLAND, MAUDE MOWERS, OSCAR LANTOR,
CHARLES THEIS, ALEXANDER STEPHENS, O.
W. WITTMER, T. S. LANE, DAVID ACKERMAN,
STANLEY HODGMAN, AUGUSTA W. HOWELL,
Appellants,

vs.

W. S. McCREA, as Trustee in Bankruptcy of the Estate
of IRVING WHITEHOUSE COMPANY, a Corpora-
tion, Bankrupt,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Eastern District of Washington,
Northern Division.

Names and Addresses of Attorneys of Record.

GRAVES, KIZER & GRAVES,

Old National Bank Building, Spokane, Wash-
ington,

S. EDELSTEIN,

Fernwell Building, Spokane, Washington,

FABIAN B. DODDS,

Old National Bank Building, Spokane, Wash-
ington,

McGARTHY, EDGE & LANTZ,

Paulsen Building, Spokane, Washington,

E. B. QUACKENBUSH,

Fernwell Building, Spokane, Washington,

ALLEN, WINSTON & ALLEN,

Paulsen Building, Spokane, Washington,

WAKEFIELD & WITHERSPOON,

Peyton Building, Spokane, Washington,
Attorneys for Appellants.

DANSON, WILLIAMS & DANSON,

Paulsen Building, Spokane, Washington,
Attorneys for Appellees. [1*]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 3812—IN BANKRUPTCY.

In the Matter of IRVING WHITEHOUSE COM-
PANY, a Corporation,

Bankrupt.

*Page-number appearing at foot of page of original certified Tran-
script of Record.

Stipulation and Agreed Statement.

In conformity with Equity Rule No. 77, the following is a statement of the case and shall be treated as supersedeas for the purposes of the appeal all parts of the record other than the Referee's certificate, the order of the Referee, the opinion of the District Judge, and the order of the District Judge from which the appeal is taken, to wit:

In the District Court of the United States for the
Eastern District of Washington, Northern Division.

No. 3612.

In the Matter of IRVING WHITEHOUSE COMPANY,

Bankrupt.

STIPULATION.

IT IS AGREED between David Ackerman, Stanley Hodgman, L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Oscar Lantor, Maude Mowers, Charles Theis, Alexander Stephens, Augusta W. Howell, T. S. Lane, O. W. Wittmer, and H. Sidney Collins, claimants for the return of certain securities, or in lieu thereof, [2] the amount realized therefrom, and W. S. McCrea, Trustee in Bankruptcy, that from the evidence which has been introduced before the Referee as to said claims, the following are the facts and may be considered as the sole facts in deciding the questions involved in said petition, to wit:

For a period of some years prior to the 3d day of August, 1921, Irving Whitehouse Company, the Bankrupt, had carried on the business of stock-broker, and as a part of such business was accustomed to buy and sell on behalf of its customers, various securities on the New York Stock Exchange. The purchases and sales were made by its New York correspondent, E. F. Hutton & Co., a member of said New York Stock Exchange, in the manner customarily followed in such transactions, and in no case did Hutton & Co. come in contact with or know the Irving Whitehouse Company's customer, but all transactions were carried on between the two corporations in the respective firm names.

The method of dealing may be generally outlined as follows: In cases where the customer of Irving Whitehouse Company desired to make the purchase and pay the full purchase price at once, such order, together with a sum equivalent to the purchase price was given to the bankrupt. An order was forwarded by it to Hutton & Co. who made the purchase, and upon receipt of the amount paid out by it or of collateral equal to the same, forwarded the securities to Irving Whitehouse Company who made delivery to its customer. If, however, a marginal transaction was desired, the method of dealing was different. The customer made his order and at the time deposited with the bankrupt as collateral either cash or securities. The bankrupt then forwarded an order and often the collateral to Hutton & Co., who made the purchase. In all such [3] cases it was Hutton & Co.

who made the actual purchase and put up the necessary funds, for which Irving Whitehouse Company, not the customer, was debited, and to afford the necessary security, Irving Whitehouse Company forwarded from time to time certain stocks and bonds as collateral, and in this connection it may be said that it was necessary for them at all times to maintain a certain ratio between their debt and the collateral held by Hutton & Co. to secure it, and at any time the collateral was deemed insufficient to afford adequate protection it became necessary to add to the amount before additional orders would be executed or securities forwarded. In all marginal transactions it was customary for Hutton & Co. to hold the securities purchased with the collateral they held to secure the Irving Whitehouse debt. If a full payment was made thereafter the amount was forwarded to Hutton & Co. and the securities released and sent on to Irving Whitehouse Company. If sales were made of the collateral held by Hutton & Co., the amount received was credited by Hutton & Co. in reducing the amount of the debt owed them. In all marginal dealings it was agreed between Irving Whitehouse Company and the customer that the securities purchased as well as the collateral put up by the customer to secure his account with the bankrupt might be rightfully repledged. As a matter of fact almost all of the collateral held by Hutton & Co. to secure the Irving Whitehouse Company account was composed either of the securities bought by marginal

traders or securities deposited by them as collateral. The permission to repledge did not, however, confer upon the bankrupt the right of doing anything more than merely repledging the securities, and it was understood that if the amount due on any account was paid in full, the bankrupt must at once deliver either the identical securities put up as collateral, [4] or purchase, or others exactly similar thereto. In no event did the bankrupt have the right to sell such securities or authorize Hutton & Co. to do so, unless for the protection of the customer's account. For some time Irving Whitehouse Company had been accustomed to speculate on the market through an account known on its books as "Account 40." Sales and purchases were made for the benefit of the company through this account, and it developed that often sales were made of securities owned not by Irving Whitehouse Company, but by its customers, so that the total actually held by Hutton & Co. for the customers of Irving Whitehouse Company was always much less than the total credited on the bankrupt's books to its customers. This total was likewise cut down by the following course of dealing: If, for instance, the bankrupt received orders to buy 200 shares of a certain stock, and on the same day an order to sell 100 shares, these orders would be forwarded to Hutton & Co. who would go upon the market and buy for Irving Whitehouse Company the difference, that is, 100 shares only, the long and short orders in such cases being balanced as to the remainder by book entries.

Due to various reasons, for some time prior to August 3, 1921, Irving Whitehouse Company was insolvent and had taken to the practice of pledging with Hutton & Co. securities left with it for safe keeping or for sale, which it had no right to pledge. Moreover, at least once before that date, the bankrupt directed Hutton & Co. to sell certain securities held on its account but which did not belong to it but were the property of its customers pledged under the understanding outlined above. As a result of these transactions, on the aforesaid date Irving Whitehouse Company was indebted to its customers who were dealing in eastern stocks and bonds through Hutton & Co. either on marginal or cash basis, in the sum of [5] \$211,098.27, computed on the basis of what the securities would have been worth on said August 3, 1921. In addition to this, the company was indebted to various other creditors in excess of the securities held by such concerns to an amount of approximately \$90,000. None of these debts have been paid. On the said 3d day of August, 1921, at the suit of one of the creditors, a receiver, F. K. McBroom was appointed by the Superior Court of Spokane County, Washington, and shortly after his appointment he instructed Hutton & Co. to sell out all securities held in the Irving Whitehouse account. The securities, the price at which they were sold, and the exact time of the respective sales, are shown by the list set out below:

SCHEDULE "A."

vs. W. S. McCrea.

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No. of Shares	Description	Amount credited to Irving Whitehouse Co. Less E. F. Hutton Com. & Tax.			Price	Sold Amount	Date Executed		Time Executed
		Amount	Com.	Tax.			Aug.	5,	
10	Mexican Petroleum	1,055.60			105¾		Aug.	5,	11.27
23	Kennicott Copper	424.01			185/8		Aug.	5	11.27
10	General Motor 6% Deb	636.85			637/8		Aug.	5	12.42
20	Montana Power	891.20			44¾		Aug.	5	2.39
30	Missouri Pacific Pfd.	1,198.05			401/8		Aug.	5	11.27
30	Northern Pacific Ry.	2,296.80			76¾		Aug.	5	11.27
10	Pennsylvania Ry.	367.05			367/8		Aug.	5	12.49
4	Pacific Oil	143.84			361/4		Aug.	5	11.27
5	Pan American Pete B	208.88			42		Aug.	5	12.28
1/10	" " "	3.04			40¾		Aug.	5	1.02
8	Pullman Company	754.48			94½		Aug.	5	1.18
17	" "	1,582.02			93¼		Aug.	5	2.06
25	Pure Oil	655.35			26¾		Aug.	5	1.51
20/50	" "	9.16			25½		Aug.	5	2.12

No. of Shares	Description	Price	Sold Amount	Date Executed	Time Executed
10	Pierce Arrow	141/8	139.32	Aug. 5, 1921	12.49
15	Royal Dutch	51	762.63	Aug. 5	12.49
14	U. S. Rubber	52	725.34	Aug. 5	11.27
2 1/2	Retail Stores	53 5/8	132.94	Aug. 5	1.50
10	Southern Ry.	197/8	196.85	Aug. 5	2.43
15	Sullivan	41	612.15	Aug. 5	2.27
10	"	42	418.10	Aug. 9	12.43
15	Sears Roebuck	65 1/8	974.03	Aug. 5	12.27
23	Swift & Company	98	2,250.00	Aug. 5	
4 1/3	Studebaker	78 1/8	337.34	Aug. 5	11.47
15	U. S. Food	17 1/8	254.03	Aug. 5,	12.28
5	United Smelting Pfc.	367/8	183.18	Aug. 9	10.30
1	United Pacific	120 1/2	119.46	Aug. 5	12.28
11	Westinghouse Elec.	43 3/4	479.36	Aug. 5	1.55
300	Denny Oil	12	10.96	Aug. 5	11.06
(200	"	10	18.92	Aug. 5	11.06
20	Silver King of Arizona (New (100 Silv. King of Ariz. Old)	5	.96	Aug. 5	11.08

No. of Shares	Description	Price	Sold Amount	Date Executed	Time Executed
1000	Canada Copper	35	341.00	Aug. 5, 1921	10.56
1000	Canada Copper	30	292.00	Aug. 5	10.56
33	"	28	8.16	Aug. 5	10.56
11	Columbia Graphophone	4 ³ / ₈	46.69	Aug. 5	12.03
3	Anglo American Oil	15 ¹ / ₄	44.71	Aug. 5	11.10
30	New Cornelia	13 ¹ / ₂			
		(Boston)			
50	Transcontinental Oil	7 ⁵ / ₈	400.42	Aug. 5	10.55
15	American Ship & Commerce	6 ³ / ₄	375.50	Aug. 5	12.11
30	General Motors	10 ¹ / ₄	99.52	Aug. 8	2.52
25	Invincible Oil	7 ¹ / ₈	301.80	Aug. 5	11.27
44	Willys Overland	6 ¹ / ₂	175.73	Aug. 5	11.27
100	"	6 ⁵ / ₈	282.26	Aug. 5	11.47
			654.00	Aug. 5	10.53
5	American Beet Sugar	29 ⁵ / ₈	146.93	Aug. 6	10.21
20	Allis Chalmers	31 ³ / ₈	623.70	Aug. 5	12.11
10	American Can	26 ¹ / ₂	263.10	Aug. 5	11.27
28	American Sugar	60 ¹ / ₄	1,849.68	Aug. 5	11.27
20	Central Leather	33 ¹ / ₈	658.70	Aug. 5	11.47

No. of Shares	Description	Price	Sold Amount	Date Executed	Time Executed
25	Certinteed Products	21 $\frac{3}{4}$	539.00	Aug. 6, 1921	11.54
15	Amer. Hide & Leather Pfd.	50 $\frac{7}{8}$	760.28	Aug. 5	2.40
10	Chesapeake & Ohio	55 $\frac{7}{8}$	556.85	Aug. 5	12.49
15	Cuban American Sugar	16 $\frac{1}{4}$	241.42	Aug. 5	11.27
17	China Copper	22 $\frac{5}{8}$	382.04	Aug. 5	12.29
35	Chile Copper	10	344.39	Aug. 5	11.27
10	Great Northern Ore	27 $\frac{7}{8}$	277.25	Aug. 5	11.27
15	St. Paul Common	27 $\frac{1}{8}$	404.03	Aug. 5	2.50
10	" " Pfd.	41 $\frac{5}{8}$	414.35	Aug. 5	11.47
19	Cerro De Pasco	25 $\frac{7}{8}$	488.02	Aug. 5	11.00
9	Chicago, Rock Island A	75 $\frac{7}{8}$	681.17	Aug. 5	1.55
11	General Electric	117 $\frac{1}{2}$	1,290.41	Aug. 5	11.00
2/100	" "	116	1.28	Aug. 5	1.02
50	General Asphalt	53 $\frac{3}{8}$	2,659.25	Aug. 5	11.00
20	Greene Cananea	20 $\frac{7}{8}$	413.70	Aug. 5	12.41
100	International Nickel	14	1,384.00	Aug. 5	(10.14)
200	" "	133 $\frac{1}{4}$	2,718.00	Aug. 5	(10.53)
25	" "	137 $\frac{7}{8}$	342.85	Aug. 5	11.00
5	Midvale Steel	243 $\frac{1}{4}$	147.38	Aug. 5	11.00

No. of Shares	Description	Price	Sold Amount	Date Executed	Time Executed
100	Loews Theatre	11 $\frac{3}{4}$	1,156.00	Aug. 5, 1921	10.23
50	Middle States Oil	11 $\frac{5}{8}$	573.55	Aug. 5	11.00
21 $\frac{1}{2}$	" "	11 $\frac{1}{4}$	27.05	Aug. 5	11.53
600	Sears Roebuck Scrip	95	586.50	Aug. 5	11.36
3	Libby	9 in Chicago	24.98	Aug. 9	11.39
2	Texas Company		.29		
22	Midwest (or Standard Oil of India)	70 $\frac{1}{2}$	2,094.96	Aug. 5	11.04
5	Stand. Oil of New Jersey Fef.	107 $\frac{5}{8}$	536.93	Aug. 16	10.19
5	Standard Oil of New Jersey Co.	135 $\frac{1}{4}$	677.25		
	This purchase of S. O. N. J. Com. and sale of S. O. N. J. Pfd. was to clear books because of a short and long caused by 5 S. O. N. J. Com. being transferred for Myron Morland when 5 S. O. of N. J. Pfd. should have been issued in his name. Error made by Irving Whitehouse Co. in July, 1921.				
\$1000	Chile 6's—1932	71 $\frac{3}{4}$	737.17	Aug. 5,	12.16
\$1000	St. Paul 4's—1925.	76 $\frac{3}{8}$	769.69	Aug. 5	12.16
\$2000	International Tel. Sales & Eng. 5-1924.	75 $\frac{1}{2}$	1,519.32	Aug. 6	11.16

Of all the securities above listed, Irving Whitehouse Company owned only the following, which sold at the price set out below:

15 Royal Dutch	\$ 762.63
50 Transcontinental Oil	375.50
10 American Can Company ..	263.10
333 Canadian Copper	12.77

Total \$1,414.00

The rest belonging to customers of Irving Whitehouse Company, by far the greater amount being the property of marginal dealers. The following securities were the only ones that had been paid for in cash, the price that each brought on the forced sale appearing opposite the security:

25 Shares Pure Oil Stock	\$ 655.35
14 Shares U. S. Rubber	725.34
30 Shares General Motors	301.80
15 Shares St. Paul Common ..	404.03
10 Shares St. Paul Preferred ..	414.35
5 Shares Chicago, Rock Island and Pacific "A"	378.42
100 Shares Loew's Theater	1,156.00
30 Shares Northern Pacific	2,296.80
10 Shares General Electric	1,173.10

Total \$7,505.19

At the time of making each of said sales, Hutton & Co. passed the net sum realized from the sale to the credit of Irving Whitehouse Company on its books. These securities were held as collateral security for an indebtedness due Hutton &

Co. from the bankrupt of \$37,690.01, and there was realized from the sale of all the securities \$48,155.28; after all of said sales had been made by Hutton & Co. the amount remaining of the money realized from the sales, after so satisfying Hutton & Co.'s claim, to wit; \$10,465.27 was transmitted to F. K. McBroom, Receiver. Thereafter certain other sums were received by McBroom, and upon the appointment of W. S. McCrea as trustee he was ordered to deduct from the amount he had on hand the receivership claims and expenses and turn the balance over to said McCrea. Pursuant to this order he delivered to said Trustee the sum of \$15,149.00 which sum the trustee still has on hand, and it appears certain that the sums coming to the said McCrea in his capacity as trustee will not exceed \$30,000.00, from which he must deduct all proper expenses and preferred claims, including his and his attorney's compensation together with any sums found to be due these petitioners, before the balance may be turned over to the creditors. At no time after said receiver received the said \$10,465.27 did the amount of money in his hands fall below that amount until after he had turned over the funds in his hands to the trustee.

Most of the said claims, amounting to \$211,098.27 were due to the fact that the bankrupt had been paid the purchase price in certain instances in full for the purchase of securities through Hutton & Co. which the bankrupt did not deliver, or that the claimants had ordered on margin to be purchased

through Hutton & Co. stocks or other securities and had put up collateral in the way of stocks or bonds with the bankrupt which the bankrupt either sold or deposited with Hutton & Co. as collateral for its account and such securities were sold by Hutton & Co. and no accounting had with the customer.

As to the various claims involved it should be remembered that each of these transactions followed in general outline the [9] course of dealings described above, and that it is only the details of importance in each particular case that are set out here.

Oscar Lantor, represented by S. Edelstein as his counsel, on June 21, 1921, ordered through the bankrupt twenty (20) shares of Northern Pacific stock, and the said bankrupt for the purpose of filing said order, ordered the said stock in its own name through Hutton & Company, and the stock was bought by Hutton & Company for the credit of the bankrupt, and the purchase price charged to the bankrupt. The said order was by wire, and on the same day the said bankrupt advised the said Oscar Lantor by wire that he had purchased the said twenty (20) shares of Northern Pacific stock, and on June 24, 1921, the said Oscar Lantor remitted in full to the said bankrupt the sum of Thirteen Hundred Forty-eight and 50/100 (\$1348.50) dollars in payment of said stock, and on June 25, 1921, the said bankrupt acknowledged the receipt of the remittance, and in said acknowledgment advised the said Oscar Lantor that the twenty (20) shares of Northern Pacific

stock was ordered transferred to the name of the said Oscar Lantor. On June 30, 1921, the bankrupt ordered the said twenty (20) shares of Northern Pacific stock through Hutton & Company to be transferred in the name of the said Oscar Lantor, but said telegram was either missent or was mis-carried, but there is no evidence Hutton & Co. received such order. On several occasions prior to August 3, 1921, the said Oscar Lantor called upon the said bankrupt for his stock and was advised that the same was being transferred. On July 18, 1921, the said bankrupt wired Hutton & Company enquiring why said stock had not been transferred in accordance with their message of June 30, 1921, at which time Hutton & Co. notified the bankrupt that the order of transfer had never been received.

The said Oscar [10] Lantor had no account with the said bankrupt prior to the transaction mentioned, never authorized the said bankrupt to hypothecate said stock with Hutton & Company nor to deal with said stock. The said Oscar Lantor had no knowledge that the said stock was being held by Hutton & Company for collateral for any indebtedness due it from the said bankrupt. The said bankrupt at divers times promised to have the transfer of said stock made in the name of Oscar Lantor, but such transfer was never made nor the stock delivered to the said Oscar Lantor up to the time of the appointment of said receiver.

David Ackerman, represented by Wakefield & Witherspoon, being the owner of one hundred (100) shares of Loew's Theatre stock, prior to August 3,

1921, delivered said stock to the bankrupt under an agreement whereby the bankrupt was to loan said stock on behalf of said claimant to E. F. Hutton & Co. to be used by said E. F. Hutton & Co. as collateral for its loans in New York, with the understanding between said bankrupt and said claimant that said Hutton & Co. would pay the claimant the prevailing call money rate of interest thereon. The referee specifically finds that said claimant did not authorize the bankrupt to pledge said stock with Hutton & Co. as collateral for the bankrupt's account; that the bankrupt did deposit said stock with Hutton & Co. as collateral for bankrupt's account, and the said stock was never returned to the claimant; that said stock was in the possession of Hutton & Co. at the time of the appointment of the receiver for the bankrupt by the Superior Court of Spokane County, Washington, and was sold by Hutton & Co., with other stock to liquidate the bankrupt's indebtedness to it, as referred to elsewhere in these findings.

Stanley Hodgman, represented by Wakefield & Witherspoon, on July 11, 1921, placed an order with the bankrupt for 5 shares of Chicago, Rock Island & Pacific Preferred "A" 7% stock, and before the appointment of receiver had fully paid for and demanded delivery of said stock. That upon the said order being placed, [11] the bankrupt on July 14, 1921, placed an order for the said stock for the purpose of complying with its contract with Hutton & Co., which last mentioned company purchased the said stock on said order at the price,

with commission, of \$366.63; the said stock being purchased for the account of bankrupt and the purchase price charged against the bankrupt, but said stock was never delivered to the claimant.

Hazel Mowers, represented by Graves, Kizer & Graves, on or about February 16, 1921, delivered to Irving Whitehouse Company one \$1,000 Chicago, Milwaukee & St. Paul bond bearing interest at 4% per annum and maturing in 1925, and instructed the company to sell the same. Later on, or about March 7, 1921, she ordered the bankrupt to purchase for her one \$1,000 Chile Copper bond bearing interest at 6%, maturing in 1932. Thereafter, in April of 1921, she ordered five shares United States Rubber Company stock, five shares of Canadian Pacific Railway Company and two shares of American Agricultural Company stock. These last mentioned securities, together with the Chile Copper Company bond, were purchased on the installment plan, but Miss Mowers desired delivery of the shares of stock last mentioned and therefore placed with Irving Whitehouse Company as collateral security one \$1,000 Chicago, Rock Island & Pacific bond, one \$1,000 Chicago, Milwaukee & St. Paul bond maturing in 1932, and one \$1,000 Chesapeake & Ohio bond, agreeing that the company might hold the same, together with the Chile Copper Company bond above referred to, as collateral security for the amount remaining due on the aforesaid shares of stock, Irving Whitehouse Company thereafter pledged all the above securities, including the Chicago, Milwaukee & St. Paul bond delivered for sale, with Hutton &

Co. Petitioner Mowers made various payments and received [12] delivery of the American Agricultural Company and the Canadian Pacific Railway Company stock. On July 27, 1921, she still owed Irving Whitehouse Company the sum of \$1,837.90, and the company was holding in pledge with Hutton & Co. the aforesaid bonds and also five shares of United States Rubber and five shares of Northern Pacific Railway. On that date, the bankrupt instructed Hutton & Co. to sell the following bonds belonging to this petitioner; the \$1,000 Chesapeake & Ohio bond, the \$1,000 Chicago, Rock Island & Pacific bond, and the \$1,000 Chicago, Milwaukee & St. Paul bond maturing in 1932. The result of this sale was, if it may be applied, to convert the debt of \$1,837.90 previously owed by Hazel Mowers to a balance in her favor of approximately \$350. On the 3d day of August, 1921, the bankrupt was holding in pledge with Hutton & Co. the following securities:

5 shares of Northern Pacific Railway Co. stock

5 shares United States Rubber Co. stock

1 \$1000 Chicago, Milwaukee & St. Paul bond
maturing in 1925

1 \$1000 Chile Copper Company bond maturing
in 1932

the last two being the identical bonds placed in pledge. These securities were sold in the manner described in the list set out above.

Mabel Conner, represented by Graves, Kizer & Graves, on or about April 13, 1921, ordered the company to purchase for her on the installment

plan five shares of Northern Pacific Railway Company stock, and put up at that time as collateral one \$1,000 Chicago Railway Company bond. The bankrupt pledged both the shares of stock which were purchased and the bond with Hutton & Co., and thereafter, on July 27, 1921, wrongfully instructed Hutton & Co. to sell the aforesaid bond. As the result of such sale, if the proceeds may be so applied, the debt owned by Mabel Connor to the bankrupt was converted into a balance in her favor of approximately \$350. The five shares of Northern Pacific Railway Company stock were sold in the manner described in the list set out above. [13]

Maude Mowers, represented by Graves, Kizer & Graves, on July 6, 1921, ordered the bankrupt to purchase for her twenty-three shares of stock of the Northern Pacific Railway Company and ten shares of stock of the Canadian Pacific Railway Company, and at the time paid the full purchase price. The Irving Whitehouse Company, however, failed to deliver such securities, but permitted them to remain in pledge with Hutton & Co. and allowed them to sell the Canadian Pacific Railway Company stock prior to August 3, 1921. The twenty-three shares of Northern Pacific Railway stock were sold in the manner described in the list set out above.

L. C. Ream, represented by Graves, Kizer & Graves, on July 5, 1921, ordered the bankrupt to purchase for him twenty-five shares of Pure Oil Company stock and paid a certain sum down, promising to pay the balance. On July 11, 1921, he

paid this balance, and on July 12, 1921, ordered the bankrupt to purchase for him twenty-five additional shares of the same security, and at that time paid the full purchase price. The securities were all purchased through Hutton & Co. and were left in pledge with them by the bankrupt. They were sold in the manner described in the list set out above.

H. E. Woodland, represented by Graves, Kizer & Graves, on the 15th day of January, 1921, ordered the bankrupt to purchase for him fifteen shares of Northern Pacific Railway Company stock and paid part of the purchase price, promising to pay the balance. On July 8, 1921, he paid the balance due and requested delivery. Irving Whitehouse Company, however, permitted Hutton & Co. to retain the said Northern Pacific Railway Company stock in pledge, and these securities were sold in the manner described in the list set out above.

T. S. Lane, represented by Allen, Winston & Allen, being the owner of a \$2,000 International Tel. Sales and Eng. 6% bond due in 1924, a long time prior to August 3, 1921, delivered said bond to the bankrupt together with other securities as collateral security [14] for a marginal account which said Lane had with the bankrupt. Prior to August 3, 1921, the bankrupt had converted securities which had been ordered by said Lane and collateral which had been delivered to the bankrupt as collateral security for said Lane's account to an extent that the debit balance of said Lane on his marginal transaction had been changed into a credit

balance in favor of said Lane. Long prior to said August 3, 1921, the bankrupt had in turn placed said \$2,000 bond with E. F. Hutton & Company as collateral security for the bankrupt's account with said Hutton & Company, and said bond remained with said Hutton & Company until after the receiver was appointed on August 3, 1921, and was sold as shown above, the amount realized from said sale being \$1,519.32.

On January 4, 1923, said Lane filed with the Referee in Bankruptcy, his claim against the bankrupt estate in the sum of \$43,719.87; on January 9, 1922, said Lane filed his amended claim with the referee in the sum of \$103,689.87; on October 16, 1922, the referee made an order regarding the recasting of claims, the effect of which was that the securities should be figured as of their value on August 3, 1921, unless the claimant should be able to show that they were converted at an earlier date, and would then be entitled to place the values as of the date of the conversion; on November 14, 1922, the said Lane filed with the referee his second amended claim in the sum of \$85,530.06; heretofore a dispute arose between said Lane and the Trustee in Bankruptcy regarding a preference which the Trustee claimed had been received by said Lane in the sum of \$6,700; this dispute was settled by the execution of a written agreement between Lane and the trustee that said Lane should pay to the trustee \$5,700, and that the claim of said Lane against the bankrupt estate was assigned as collateral security to secure the payment of said sum

of \$5,700. This claimed preference of \$6,700 arose out of the fact that immediately prior to the appointment of the receiver [15] in the state court, the bankrupt, without said Lane's knowledge, caused said sum to be deposited in a New York bank to the credit of said Lane; prior to the failure said Lane had given to the bankrupt a note for \$7,000 executed by him for which he received no consideration, and this note was pledged by the bankrupt with the Fidelity National Bank with other securities for an obligation due from the bankrupt to said bank; had said transfer of money not been made the result would have been that the debt due from the bankrupt to the Fidelity National Bank would have been reduced by the money so deposited to the credit of said Lane. The \$2,000 debenture of the International Tel. Sales and Eng. Co. was included in each of the claims filed by said Lane with the referee, the claimant claiming an indebtedness due to the conversion of said debenture.

F. D. Allen, of counsel for said Lane, on or about October 17, 1922, received from the referee a copy of the order of October 16, 1922, above referred to; he thereupon proceeded to investigate to determine the date of the conversion of the securities of said Lane, and then discovered that said debenture had been sold in the manner and at the time shown above; he communicated this information to said Lane who then, for the first time, had actual knowledge of the facts as to the time and manner when said debenture was sold or had gone into the hands of the receiver.

Irving Whitehouse, the president of the bankrupt, had been employed by said Lane in business enterprises in Butte, Montana, some years prior to August 3, 1921, had after the bankrupt had commenced operations in New York traded with it extensively; about the Friday preceding the appointment of the receiver, checks drawn by the bankrupt company were dishonored, information of this fact was given to F. D. Allen, one of the bankrupt's attorneys; as a result thereof a conference was held in which said Lane either participated or of [16] which he had knowledge, and as a result thereof, an investigation was then made and conferences had with certain accountants of the bankrupt, with the result that prior to the time of the failure said Lane knew that the bankrupt was hopelessly insolvent and that it had been kiting checks; that it had an overdrawn bank account, and that it had pledged and sold large amounts of the securities of its customers; claimant further went to the Fidelity National Bank and made investigation there as to the status of the bankrupt's account, ascertaining that it was overdrawn to the extent of about \$20,000 and that large amounts of securities belonging to said Lane and other customers had been pledged, and many of them sold. Said Lane is a man of wide experience and had he gone to the books of the bankrupt corporation he could have discovered with but little difficulty the fact that the debenture in question was in the possession of Hutton & Company, as security for Hutton's advances to the bankrupt, and had not been

sold prior to the time of the appointment of the receiver. Said Lane has filed with the referee his consent that in passing upon his claim for reclamation of said fund, that the referee may make such order as will do equity herein.

Charles Theis, represented by Fabian B. Dodds, prior to April 10, 1921, ordered through the bankrupt, 30 shares of American Hide & Leather, preferred, and one I. L. Flagler ordered through the bankrupt 10 shares of the same stock; the bankrupt in turn ordered this stock through Hutton & Company, and the stock was purchased by Hutton & Company on the order of the bankrupt. On May 10, 1921, Hutton & Company held 40 shares of this stock for the account of bankrupt, and there were no other customers of the bankrupt who were long on this stock at the time the receiver was appointed August 3, 1921, and the bankrupt owned no Hide & Leather stock except that held with Hutton & Company. On May 10, 1921, 25 shares of the said stock was sold by Hutton & Company on the [17] order of the bankrupt, and the proceeds converted by the bankrupt; the remainder of 15 shares continued to be held by Hutton & Company until after the receiver was appointed in the said court, and was sold as shown above, and in point of time as to the other securities as shown elsewhere in this stipulation. On August 3, 1921, at the time the receiver was appointed, said Theis and said Flagler had a credit balance on the books of the bankrupt due to the conversion of their securities. I. L. Flagler has not appeared in this special proceeding in any manner whatever.

H. Sidney Collins, represented by John King, on July 8, 1921, ordered through the bankrupt, 10 shares of American Telephone and Telegraph Co. stock, and paid in full for same. The bankrupt in turn, for the purpose of performing its contract with Collins, ordered the said stock through Hutton & Company, and it was purchased by Hutton & Company. On August 2, 1921, prior to the appointment and qualification of the receiver Hutton & Company on the order of the bankrupt sold all American Telephone and Telegraph stock which it held for the bankrupt and applied the proceeds toward the liquidation of the indebtedness due it from the bankrupt for which the stock was held as collateral.

On or about July 19, 1921, Augusta W. Howell placed an order with Irving Whitehouse Company for ten (10) shares of General Electric Company stock, and was charged by Irving Whitehouse Company with the full purchase price thereof with commissions, amounting to Eleven Hundred Ninety-one (\$1191.00) Dollars. Immediately thereafter said Irving Whitehouse Company, in compliance with said order, bought from Hutton & Company, its New York correspondent, for said Augusta W. Howell ten (10) shares of said General Electric Company stock. On July 26, 1921, said Augusta W. Howell paid said Irving Whitehouse Company said sum of Eleven Hundred Ninety-one (\$1191.00) [18] Dollars, which paid for the said stock in full, and directed said Irving Whitehouse Company to deliver said stock to petitioners. On the 3d day

of August, 1921, Hutton & Company held for the account of the bankrupt ten (10) shares of said General Electric Company stock. Hutton & Company also held for the account of the bankrupt one and two-hundredths (1.02) shares of General Electric stock purchased for another customer who had ordered one and two-hundredths (1.02) shares from bankrupt. There were no other customers in General Electric stock, and the bankrupt was not carrying any of such stock for its own account.

Said Augusta W. Howell filed a claim for said sum with the receiver in said Superior Court and also filed a claim for said sum in the above-entitled court. Prior, however, to filing either of said claims, and on or about the 2d or 3d day of August, 1921, Mr Kimmel and Mr. Blum of the Union Trust Company, acting for Miss Howell, went to the office of the Irving Whitehouse Company and asked whether the bankrupt had purchased the stock so ordered and were informed or understood that such stock had not been ordered and was not on hand, and said claims were filed by said Augusta W. Howell with that understanding and belief. Upon discovery of the facts and on or about November 1, 1922, and prior to the declaration of any dividend by the bankrupt's estate, filed her withdrawal of her claim as a creditor for money paid the bankrupt, and has never received any dividend as a general creditor for money paid the bankrupt, and has never received any dividend as a general credi-

tor, and has elected to stand upon her petition to reclaim the proceeds of the stock.

As to Alexander Stephens, represented by McCarthy, Edge & Lantz, the facts were as follows:

Testimony of Alexander Stephens, for Plaintiffs.

ALEXANDER STEPHENS testified substantially as follows: [19]

“I had a balance on deposit with Irving Whitehouse Company for some five or six months prior to January 5, 1921, amounting to \$465.00. On that date I went to the Irving Whitehouse Company and asked them to purchase for me such amount of the New Cornelia stock as my money on deposit would pay for in full. They figured it up for me and said that my money would purchase thirty shares and leave a balance of about \$15.00. I do not remember giving any written order, or any order whatever, or for any fixed number of shares, but I understood that I was to get 30 shares.

“A few days later they sent me a statement or told me that they had purchased on my account 30 shares of the stock, and that on account of change in price that the purchase, including their commission, amounted to \$15.50 more than my money. I disputed this and doubted that they had paid such price and requested that proof be submitted that they had paid for the stock the price they claimed, and they promised to supply the same, but never did so. The matter was simply let drag along and I never demanded my money back or in any way repudiated the transaction and never demanded the

(Testimony of Alexander Stephens.)

delivery of the stock. I was billed for the balance of \$15.50, with interest thereon, monthly by the Irving Whitehouse Company until the time of the receivership and bankruptcy, and herewith submit a sample of one of the bills or statements referred to above. They told me when I purchased the stock that it was a stock which could not be purchased on a margin and that it would have to be paid for in full purchase price when purchased, and I understood it was not a marginal transaction. I am willing to pay the \$15.50 balance with interest thereon, or permit it to be deducted from a distribution to me in accordance with my petition herein."

Testimony of J. C. Bird, In His Own Behalf.

Mr. J. C. BIRD, accountant for bankrupt, testified substantially as follows: [20]

"That on or about January 5, 1921, another employee of Irving Whitehouse Company brought me an order for 30 shares of New Cornelia stock which I immediately executed. The price paid including the commission actually was \$15.50 more than the money Mr. Stephens then had on deposit. It is the custom of brokers to take orders for specific numbers of shares, and we cannot execute an order in New York except for a definite number of shares. I would not consider this a marginal transaction as it was about fully paid for and the amount had no relation to the market fluctuations, but our practice was to carry as a marginal transaction any stock on which there was some balance due, no matter

(Testimony of J. C. Bird.)

how small, and we considered we had the right to hold stock purchased in pledge until the full purchase price was paid, and this was the way in which we carried this transaction and is the general custom of stockbrokers. The New Cornelia transaction had with Mr. Stephens was the only transaction which was ever had with Irving Whitehouse Company by Mr. Stephens or anyone else with reference to that class of stock, and the stock purchased was for the account of Mr. Stephens."

As to the claimant O. W. Wittmer, represented by E. B. Quackenbush, the facts are as follows:

Testimony of O. W. Wittmer, In His Own Behalf.

O. W. WITTMER, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. QUACKENBUSH.)

Q. Mr. Wittmer, you may state how this account was handled with Hutton & Co., through the Whitehouse Co.

A. Well, this Middlestates Oil, a hundred shares of it, was purchased through Wolff & Co., of New York, and it was purchased on deposit of \$780.00 worth of German Government bonds as collateral. That amount was afterwards transferred to Hutton & Co., through Irving Whitehouse dealing with me, and immediately after the account [21] was transferred Whitehouse Co. notified me that Hutton would not accept German Government bonds as collateral for the account, and in lieu thereof I

(Testimony of O. W. Wittmer.)

put up cash to the extent of—I made three payments, \$250.00 at one time, \$100.00 at another, and \$150.00 at another. My arrangement with Whitehouse & Co. was on what they call a payment plan, not a marginal account in which a man signs a release of the stock he buys; no release of that kind was ever signed.

Q. Did you ever consent to— A. No, sir.

Q. —the use of your securities for any other purpose?

A. No, sir; I told them very emphatically before the account was transferred that I wanted to make it absolutely safe it would not be sold out, and that was the stipulation and the agreement. On the payment of the last amount of money that receipt and agreement was prepared and handed to me.

Q. Did you ever consent at any time to Whitehouse obtaining possession of these bonds?

A. No, sir.

Q. That is, the German Government bonds, 60,000? A. No, sir.

Q. When did you first know he had taken possession of them?

A. I did not know anything about it until I got back here after the failure had occurred.

Q. What time was that?

A. I came back about the latter part of August.

Q. When did you leave here?

A. I left here the 25th day of May.

Q. Immediately when you got that information did you make an effort to get these bonds?

A. I most certainly did.

(Testimony of O. W. Wittmer.)

Q. Where did you find they were? [22]

A. Well, for a long time I did not find out about them, except everything was on—

Q. Did you ever go over to their office to try to find out? A. Yes, sir.

Q. Did you get the information?

A. Finally I got the information from Mr. Byrd.

Q. What did you do in an effort to get them?

A. We entered suit.

Q. First did you make an effort to get them from the bank?

A. I wrote to the bank and they informed me—

Mr. WILLIAMS.—Just a moment. I object to that as hearsay, and further it is not the best evidence.

The WITNESS.—What do you mean, Mr. Williams?

Mr. WILLIAMS.—That is, what the bank may have said to you by letter is not the best evidence.

The REFEREE.—Sustain the objection.

Mr. QUACKENBUSH.—Did you make a demand on the bank for these bonds? A. Yes, sir.

Q. Did they give them to you? A. No, sir.

Q. And later what did you do?

A. I gave them even the numbers of each bond.

Q. Did they have those bonds?

A. Yes, sir, they admitted they had them.

Mr. WILLIAMS.—I move to strike that as hearsay, what they admitted.

The REFEREE.—Well, Mr. Byrd testified they had them.

(Testimony of O. W. Wittmer.)

Mr. WILLIAMS.—Yes, there is no doubt about that.

Mr. QUACKENBUSH.—Were you ever able to get possession of the bonds? A. No, sir.

Q. What else did you do towards getting them?

A. Well, I instituted suit against them and made every effort to get them without letting it go to suit. [23]

Q. Found out eventually you had to abandon it because they had a claim you could not beat?

Mr. WILLIAMS.—Just a minute. I object to that as a conclusion.

Mr. QUACKENBUSH.—Why did you abandon the suit?

A. Principally because they held them and did not acknowledge my rights in there, said they were put up by Irving Whitehouse.

Mr. WILLIAMS.—I object to that as hearsay.

The REFEREE.—Sustain the objection.

Mr. QUACKENBUSH.—You have never been able to recover them?

A. No, sir; I have not been able to recover them.

Q. Now, state the condition of the account from that time on, from the time you paid \$250.00, as you know it to be.

A. Well, I only know what the books showed. The book showed that fifty shares of the stock had been—

Mr. WILLIAMS.—We have already got that in evidence.

(Testimony of O. W. Wittmer.)

Mr. QUACKENBUSH.—Do you know what the value of the bonds were on June 10, 1921?

A. Yes, sir.

Q. What was it?

Mr. WILLIAMS.—I think I will object to this witness testifying; he has not shown himself qualified to testify.

The WITNESS.—That is what you had this gentleman here to testify.

Mr. QUACKENBUSH.—Did you look up the market report of those bonds for the month of June, to-day, or of the marks?

A. Yes, sir; I went down to the library this morning and they would not let me take the large books in which these were away from the library, so I copied them under date of June 10, to June 15th.

Q. What were those books?

Mr. WILLIAMS.—Just a minute. May I see your figures before I object?

The WITNESS.—Yes, that is per thousand.

Mr. WILLIAMS.—I object to it as not being the best evidence. I [24] do not want to be technical about it, but we have not those papers here to see what they show the condition of them.

The REFEREE.—There is nothing I can do but sustain the objection.

The WITNESS.—Mr. Mallette, who was just here said that the records show from the 5th of June to the 16th of June, they varied from 16 down to 12 $\frac{1}{2}$.

Mr. WILLIAMS.—I object to what Mr. Mallette said.

(Testimony of O. W. Wittmer.)

Mr. QUACKENBUSH.—What did you take those off of, Mr. Wittmer?

A. The “New York Times.”

Q. The “New York Times”? A. Yes, sir.

Q. The general market reports as made on those dates in the “New York Times”?

A. Yes, sir. From each paper each day.

Q. Are those figures you have there a correct transcription of them?

The REFEREE.—I have sustained objection as to his testimony as to that.

Mr. QUACKENBUSH.—I understood here we could use the books or papers.

Mr. GRAVES.—He cannot testify.

Mr. QUACKENBUSH.—Refreshing your memory from the market reports as you know them to be, you may state if you know what the prices of those German marks were on the 10th day of June.

Mr. WILLIAMS.—Just a minute. I object. The report he has seen in the paper would be the best evidence, not his recollection of what it was.

The REFEREE.—There is no doubt about that.

Mr. QUACKENBUSH.—Can we use the “Review”?

Mr. WILLIAMS.—I won’t object to the “Review.”

Mr. QUACKENBUSH.—Now, Mr. Wittmer, at any time did you sign any document or contract or paper or anything of that kind authorizing Whitehouse or Hutton to dispose of those bonds, or of the Middlestates [25] Oil stock?

(Testimony of O. W. Wittmer.)

A. No, sir; there was no release given or anything of the kind.

Q. Did you sign the ordinary purchaser's contract with Whitehouse? A. No, sir.

Q. Or with Hutton & Co. from them? A. No.

Mr. GRAVES.—What do you mean by ordinary purchaser's contract?

Mr. QUACKENBUSH.—That is where they sign the right to hypothecate and all that.

Mr. GRAVES.—There is no contract of that kind except the taking of the receipt.

The WITNESS.—Well, that is on the receipt.

Mr. GRAVES.—There is no contract signed at the time that the customer goes in and opens his account with them.

The WITNESS.—When he purchases without paying for them, there always is.

Mr. McCARTHY.—When he buys on a margin, there always is.

Cross-examination.

(By Mr. GRAVES.)

Q. Now, at this time this was the only agreement, this embodies all of the agreement entered into between yourself and Irving Whitehouse Company? I am referring to Wittmer's Exhibit 3.

A. That is the only written agreement; yes, sir.

Q. Any oral agreement you entered into, was made at the same time or about the same time?

A. Well, practically the same thing; the account was transferred a little before that.

Q. Any oral agreement you made was made prior to the date of this written agreement?

(Testimony of O. W. Wittmer.) ‘

A. Yes, sir

Q There was no oral agreement subsequent to the date of this? A. No, sir. [26]

Q. At all times you were indebted on your installment transaction for the purchase price of these one hundred Middlestates Oil up to the 3d of August, 1921?

A. Not according to their books, no sir; according to their statement, I was.

Q. As I say, you had never paid the full purchase price of these Middlestates Oil up to the 3d of August, 1921? A. No, sir.

Q. And before that time you were indebted to the Whitehouse Company in the amount remaining over these installments that you had paid from month to month?

A. Well, I want to answer that question right but according to their records I was not in debt to them, but not according to their statement, I was.

Q. Well, had you prior to the 3d of August, 1921, paid the full purchase price of 100 Middlestates Oil to Irving Whitehouse Company? A. No, sir.

Mr. GRAVES.—All right.

Redirect Examination.

(By Mr. QUACKENBUSH.)

Q. Did you know they had converted your German marks before the 3d of August?

Mr. WILLIAMS.—I object to that as a conclusion.

A. No.

Mr. QUACKENBUSH.—Did you know that Irv-

(Testimony of O. W. Wittmer.)

ing Whitehouse had taken possession of these German government bonds and applied them on his own account to the National City Bank of Seattle?

Mr. GRAVES.—I object, that is incompetent, irrelevant and immaterial. Under the custom proved the broker may repledge any securities that are up on a marginal transaction in any way that he wants, but it makes no difference whether Mr. Wittmer knew they were dealing in [27] these securities in the manner in which they were entitled to.

Mr. QUACKENBUSH.—They could not transfer it and not give him credit for it.

Mr. GRAVES.—Your Honor will take judicial notice.

The REFEREE.—I know that is the general custom.

Mr. QUACKENBUSH.—When you say you owed him, do you take into account the proceeds of any of this collateral of yours?

A. Absolutely not.

Mr. GRAVES.—I object, that is incompetent, irrelevant and immaterial.

The Referee.—What was that question? (Question read.)

Mr. GRAVES.—I object on the ground that it is incompetent, irrelevant, and immaterial. We are trying to ascertain the true basis or the true outlines of the account between Mr. Wittmer and Irving Whitehouse Co., and he may not take credit for any stuff he has put up there for collateral.

The REFEREE.—Let him answer, whether it is material or not. I will decide later, but he is going away so he may answer.

A. (Answer read.)

Mr. QUACKENBUSH.—That is all.

Mr. GRAVES.—That is all.

Witness excused.

Testimony of J. C. Byrd, for Plaintiffs.

J. C. BYRD testified as follows:

“Mr. Wittmer had carried on an account with Wolf & Company of New York, and at the time of the transfer of his account to Hutton & Company was indebted to Wolf in the sum of approximately \$1400.00 to secure which Wolf held as collateral 100 shares of Middlestates Oil and German government bonds for 60,000 marks. He caused this account to be transferred from Wolf & Company to Hutton & Company through the agency of Irving Whitehouse Company. The transaction was consummated by Hutton & Company paying the debit balance due to [28] Wolf & Company and charging Irving Whitehouse Company with the amount so paid. Irving Whitehouse Company, in turn, charged Wittmer for the same amount. The collateral carried with Wolf & Company was turned over to Hutton & Company, but Hutton & Company refused to carry the 60,000 government bonds because of the weakness of the market. Wittmer was a marginal dealer, and both the Middlestates Oil and the 60,000 government bonds were held as collateral by Irving Whitehouse Company on his account and the Ger-

(Testimony of J. C. Byrd.)

man bonds were shown as collateral on the statements rendered him by Irving Whitehouse Company. The bonds were shipped to Spokane after Hutton & Company refused to hold them, and were pledged by Irving Whitehouse Company on its own account with the National City Bank of Seattle some time in June of 1921. Wittmer did not sign the usual contract signed by customers of Irving Whitehouse Company, nor any other contract or agreement with Whitehouse & Company. Wittmer's exhibit 3 is a receipt for \$250.00 paid by him to cover five monthly payments of \$50.00 each, including all payments due up to and including the 15th of October, 1921. The receipt contains an agreement that the stock would not be closed out prior to that date. The only effect of this contract is to provide that if the market should fall greatly so that with the money put in Wittmer would still need more to make his margin, he would nevertheless not be sold out since he had paid ahead and would on that date make good what the market had lost. Disregarding any conversion of securities of Wittmer, the amount he owed Irving Whitehouse Company on August 3, 1921, was \$855.69; 50 shares of Middlestate Oil belonging to Wittmer had, however, been sold by Irving Whitehouse Company prior to that date for \$553.00, so that if he received credit for such sale he would still be indebted to Irving Whitehouse Company in the sum of \$300.00 [29] disregarding any questions of the conversion of the German bonds. It is the custom in all mar-

ginal transactions carried on between the broker and his customer that the broker may rehypothecate any securities which he holds on the customer's account so long as the customer remains indebted to him. Neither Irving Whitehouse Company nor any of its customers, with the exception of Mr. Wittmer, were at the time of the failure long in Middlestates Oil, and there were at that time 521½ shares of that stock carried by Hutton & Company on the Irving Whitehouse account which appear to be some of the identical shares which were transferred from Wolf & Company to Hutton & Company."

Whereas, on or about September 29, 1922, the Referee on the petitions of the claimants David Ackerman, Stanley Hodgman, L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Oscar Lantor, and Maude Mowers made an order on the facts relating to such claimants above set forth, which order has been certified to the District Court for review, but has not been passed upon, and it is the desire to have the rights of all the claimants named in this stipulation disposed of by one order, subject to review. It is Further Agreed by said David Ackerman, Stanley Hodgman, L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Oscar Lantor, Maude Mowers and the Trustee that the said previous order of the Referee may be set aside and vacated and for naught held, and that the whole matter shall now be disposed of in one order, subject to review, and if in order to carry out the purpose it is necessary that the District Judge shall

make an order cancelling the said previous order made by the Referee, that such course shall be taken.

Dated, this — day of April, 1923.

WAKEFIELD & WITHERSPOON

Attorneys for David Ackerman, Stanley Hodgman
and Augusta W. Howell.

GRAVES, KIZER & GRAVES,

Attorneys for L. C. Ream, Hazel Mowers, Mabel
Connor, H. E. Woodland and Maude Mowers.
[30]

S. EDELSTEIN,

Attorney for Oscar Lantor.

FABIAN B. DODDS,

Attorney for Charles Theis.

McCARTHY, EDGE & LANTZ,

Attorneys for Alexander Stephens.

ALLEN, WINSTON & ALLEN,

Attorneys for T. S. Lane.

E. QUACKENBUSH,

Attorney for O. W. Wittmer.

Attorney for H. Sidney Collins.

DANSON, WILLIAMS & DANSON,

Attorneys for W. S. McCrea, Trustee.

The foregoing stipulation and agreed statement signed and dated at Spokane, Washington, this — day of August, 1923.

WAKEFIELD & WITHERSPOON,
Attorneys for David Ackerman, Stanley Hodgman
and Augusta W. Howell.

GRAVES, KIZER & GRAVES,
Attorneys for L. C. Ream, Hazel Mowers, Mabel
Connor, H. E. Woodland and Maude Mowers.
S. EDELSTEIN,

Attorney for Oscar Lantor.

FABIAN B. DODDS,

Attorney for Charles Theis.

McCARTHY, EDGE & LANTZ,

Attorneys for Alexander Stephens.

ALLEN, WINSTON & ALLEN,

Attorneys for T. S. Lane.

E. B. QUACKENBUSH,

Attorney for O. W. Wittmer.

DANSON, WILLIAMS & DANSON,

Attorneys for W. S. McCrea, Trustee.

Approved:

JEREMIAH NETERER,

District Judge, Presiding Who Determined the Is-
sue Presented. [31]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3812.

In the Matter of IRVING WHITEHOUSE COMPANY, Bankrupt.

Order Directing Distribution of Moneys to Petitioners.

In the petitions of David Ackerman, Stanley Hodgman, L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Oscar Lantor, Maud Mowers, Charles Theis, Alexander Stephens, Augusta W. Howell, Thaddeus S. Lane, O. W. Wittmer and Sidney H. Collins.

A consolidated hearing of the claims of the above petitioners was made before me on a stipulation of fact entered into between these petitioners and W. S. McCrea, as Trustee in Bankruptcy, the petitioners being represented by their respective counsel, and the Trustee by his, and from the record herein it appears that W. S. McCrea, as Trustee in Bankruptcy, now has in his possession and wrongfully withholds from the petitioners whose names are set out below the sum of Ten Thousand Four Hundred Sixty-five and 27/100 (\$10,465.27) Dollars, which sum is composed of the proceeds of the sale of certain securities, many of which belonged to these petitioners; and that a notice has been duly published and an order duly entered to the effect that any person who had or claimed to have any

interest in this said fund should present his petition before the 5th day of February, 1923, or be estopped to set up any such claim; and that no persons other than the above petitioners have appeared in these proceedings; and that the aforesaid sum is insufficient to reimburse each petitioner in full for the loss sustained by the sale of his securities, but that the claim of O. W. Wittmer against this fund is inferior and subject to the claims of the other petitioners who are entitled to take priority over him in the distribution of said fund; and that the said fund now wrongfully withheld [32] by the said W. S. McCrea from these petitioners should be distributed among them in the following manner, to-wit:

David Ackerman	is entitled to the sum of	\$1156.00
Stanley Hodgman	is entitled to the sum of	369.71
L. C. Ream	is entitled to the sum of	655.35
Hazel Mowers	is entitled to the sum of	1936.36
Mabel Connor	is entitled to the sum of	169.50
H. E. Woodland	is entitled to the sum of	509.50
Oscar Lantor	is entitled to the sum of	673.00
Maud Mowers	is entitled to the sum of	775.10
Thaddeus S. Lane	is entitled to the sum of	1519.32
Charles Theis	is entitled to the sum of	760.28
Augusta Howell	is entitled to the sum of	1172.91
Alexander		
Stephens	is entitled to the sum of	384.92
Total		<hr/> \$10,081.95

It further appears that O. W. Wittmer is entitled to receive the balance remaining from such fund after the aforesaid sums have been distributed to the other petitioners. The amount he is, therefore, entitled to is \$383.32.

It further appears that the proceeds of the sale of the securities belonging to Sidney H. Collins are not included in this fund and that therefore this petitioner is not entitled to any sum whatever from said fund.

WHEREFORE, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED that said W. S. McCrea, as Trustee in Bankruptcy herein, deliver to the aforesaid petitioners the several sums set opposite their names and deliver to the said O. W. Wittmer the balance remaining over, to-wit: the sum of \$383.32.

Dated this 27th day of April, 1923.

SIDNEY H. WENTWORTH,
Referee in Bankruptcy.

Filed in the U. S. District Court, Eastern District of Washington, May 18, 1923. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [33]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

IN BANKRUPTCY—No. 3813.

In the Matter of IRVING WHITEHOUSE COM-
PANY, a Corporation, Bankrupt.

Certificate of Referee.

To the Honorable J. STANLEY WEBSTER, District Judge: I, Sidney H. Wentworth, the Referee in charge of this proceeding, hereby certify:

That in the course of said proceeding an order, the original of which is handed up herewith, was made and entered on the 27th day of April, 1923.

That on the 7th day of May, 1923, the trustee of said bankrupt estate and O. W. Wittmer, one of the petitioners hereinafter mentioned, feeling aggrieved thereat, each filed a petition for a review thereof, both of which petitions were granted.

That the order to be reviewed was made upon the petitions of David Ackerman, Stanley Hodgman, L. C. Ream, Hazel Mowers, Charles Theis, Alexander Stephens, Augusta W. Howell, T. S. Lane, O. W. Wittmer, and Sidney H. Collins that the trustee return to them certain securities, or, in lieu thereof, the amount realized therefrom.

That the facts brought forth by the evidence introduced before me on the hearing of said petitions are undisputed, and, with three exceptions, are stated in a stipulation signed by counsel for all of the petitions and handed up herewith. The facts above referred to as not stated in the stipulation are a part of the records in this proceeding and were considered by me in making the order to the review. These facts are:

(1) That upon the petition of Oscar Lantor, David Ackerman, [34] Stanley Hodgman, Hazel

Mowers, Mabel Connor, Maude Mowers, L. C. Ream and H. E. Woodland an order was made by me on January 23d, 1923, requiring all persons having or claiming to have an interest in the fund in controversy, to show cause before me on February 5, 1923, at 10:00 o'clock A. M. why the said fund should not be distributed under my order of September 29th, 1922 (mentioned on pages 25 and 26 of the stipulation as to facts), directing personal service thereof upon all known claimants to said fund and publication thereof, and ordering that such services be sufficient to bar all claimants from asserting any rights to the aforesaid fund, who should not appear to prove an interest therein on said return day. This petition, and the order to show cause, with the acceptance of service of known claimants and the affidavit of publication thereof are handed up herewith. (2) That no one may have an interest in said fund, except the petitioners above mentioned, has attempted to assert a claim to said fund up to the date of this certificate. (3) That the sum of \$15,-149.00 mentioned on page 7 of said stipulation has been in the hands of the trustee since February 9th, 1922.

That the questions presented by this review, briefly stated, are:

(1) Are all parties who may have an interest in said fund, except those who have already appeared, now barred from asserting their claims thereto?

(2) Has the trustee any interest in said fund as against those of the aforesaid petitioners who did

not consent to the pledge of their securities with Hutton & Co.?

(3) Has the trustee any interest in said fund as against those of the aforesaid petitioners who consented to the pledge of their securities with Hutton & Co.

(4) Does the order to be reviewed distribute the fund among the petitioners in accordance with their respective rights? [35]

In addition to this general statement of the questions before the Court, I set forth the errors of the referee alleged in the two petitions for a review.

The Trustee contends that the referee erred as follows:

(1) In making a finding in such order that the Trustee now has in his possession and wrongfully withholds from petitioners or any of them the sum of \$10,465.26 or any part thereof, or from any of the claimants the amounts allowed them by the said order.

(2) In making a finding that the said sum of \$10,465.27 is composed of the proceeds of the sale of certain securities many of which belonged to said petitioners or any of them.

(3) In making a finding that any notice has been given of any order entered which in any manner affects any other person who might be interested in said fund of \$10,465.27, except those who appeared in such proceeding.

(4) In making a finding that the said fund of \$10,465.27 should be distributed as provided by said order.

(5) In making a finding that the said sum of \$10,465.27 or any part thereof was realized from the sale of any securities belonging to the claimants David Ackerman, Stanley Hodgman, L. C. Ream, Hazel Mowers, Charles Theis, Alexander Stephens, Thaddeus S. Lane, Augusta W. Howell and O. W. Wittmer, or either or any of them.

(6) In making a finding that said sum of \$10,465.27 includes \$760.28 from the sale of any securities of Charles Theis or any amount derived from the securities of said Charles Theis in excess of three-fourths of \$760.28.

(7) In ordering the Trustee to pay the said several petitioners or any of them the amounts specified in said order, or any amount.

Particularly, the Trustee has always insisted and now insists that none of the said claimants other than Lane and Theis have traced the proceeds of any of their securities into the hands of the Trustee [36] and as to said Theis, he has traced but a three-fourths interest in the fifteen shares of American Hide & Leather stock which survived the Hutton & Co. sale. That as to the said claimant Lane, he is entitled to no relief, since he elected to take as a general creditor.

The petitioner Wittmer alleges the following errors on the part of the referee:

(1) That said findings and order are contrary to law.

(2) That said findings and order are contrary to and against the evidence.

(3) That said findings and order, in so far as it denies to this petitioner the right to have distributed to him the said \$666.86 is without sufficient evidence to support it.

(4) That said findings and order, in so far as they adjudge that the said Irving Whitehouse Company, Bankrupt, did not convert the German Government Bonds in the sum of 60,000 marks is against the law and the evidence and without sufficient evidence to support it.

(5) That the findings and order, in so far as they find and hold that this claimant did not have a credit balance with the said bankrupt at the time of its insolvency, is contrary to and against the law and the evidence.

(6) That said referee erred in his conclusions of law from the evidence and stipulations made by the parties as to the facts adduced on said hearing.

I hand up herewith for the information of the Judge the following papers:

- (1) The order to be reviewed.
- (2) The trustee's petition for a review.
- (3) O. W. Wittmer's petition for a review.
- (4) Stipulation of counsel as to facts.
- (5) The petitions of said petitioners.
- (6) The trustee's answer to said petitions, [37]
- (7) Reply of Augusta W. Howell, O. W. Witmer and T. S. Lane to the trustee's answer to their respective petitions.
- (8) The petition and order to show cause above mentioned with acceptance of service and affidavit of publication of order to show cause.

- (9) Wittmer's exhibits 1, 2, and 3.
(10) Alexander Stephens' exhibits 1, 2, and 3.

Respectfully submitted,

SIDNEY H. WENTWORTH,

Referee in Bankruptcy.

May 17, 1923.

Filed in the U. S. District Court, Eastern District of Washington, May 18, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [38]

In the United States District Court for the Eastern District of Washington Northern Division.

No. 3812—BANKRUPTCY.

In the Matter of IRVING WHITEHOUSE COMPANY,

Bankrupt.

Decision.

Filed July 18, 1923.

The bankrupt was a stockbroker, a greater portion of his business being marginal transactions. Upon an order for the purchase of *specifi*- securities and payment of not less than twenty per cent of the purchase price, the bankrupt advanced the balance and held the security as collateral, obtaining the right to repledge the same and thereupon borrowed from Hutton & Co., New York brokers, the necessary amount to complete the purchase, and repledged the security, it having on deposit with Hutton & Co. a considerable amount of security; and upon receiving an order to purchase listed stock on

the New York exchange it was forwarded to Hutton & Co. in its own name, and its account debited, and the purchased security was added to the bankrupt's collateral, and the account of the customer was debited by the bankrupt to the difference between the marginal deposit and the purchase price. Some purchasers paid in full and permitted the stock to remain with the bankrupt, who treated it in the same way as with Hutton & Co., while others deposited their security to cover the marginal deposit, which security was deposited with Hutton & Co. with the security purchased. Some securities endorsed in blank were delivered to the bankrupt for safe keeping, or for sale, and the securities were forwarded to Hutton & Co. to bankrupt's account. When stocks purchased were paid for in full the purchasers did not press for delivery, and the bankrupt, instead of redeeming such stock from the lien pledge permitted it to remain with Hutton & Co. and for some time prior to adjudication the bankrupt converted and caused to be converted securities of customers to its own use. On August 3, 1921, a receiver was appointed for the bankrupt by the State Court. On this day Hutton & Co. held as collateral deposited by the bankrupt \$48,000, to secure an indebtedness of \$37,690.01. The securities, upon the order of the court, were directed to be sold by the receiver, and the surplus, after the payment of the indebtedness due to Hutton & Co. from the bankrupt, was paid to the receiver. 100 shares Loew's Theatre; 30 shares New Cornilia; Middlestate Oil 52½ shares; Nor. Pac. 30 shares; 14 shares

U. S. Rubber; 1 \$1000, Chile Copper bond, maturing 1932; 1 \$1000. C. M. ST. P. bond maturing 1925; 25 shares Pure Oil; 5 C. R. I. & Pac.; 40 shares Amer. H. & Leather; 1 \$2000. Inter. Tel. Sales & Eng. bond; 10 shares General Electric. The petitioners assert preferred claims against these several stocks. The trustee contends that the preferred claim should be denied, and the fund distributed to all of the creditors in proportion to their respective claims.

DANSON, WILLIAMS & DANSON, Attorneys for
TRUSTEE.

GRAVES, KIZER & GRAVES, Attorneys for
L. C. REAM, HAZEL MOWERS, MABEL
CONNOR, H. E. WOODLAND and MAUDE
MOWERS.

S. EDELSTEIN, Attorney for OSCAR LANTOR.
FABIAN B. DODDS, Attorney for CHARLES
THEIS.

McCARTHY, EDGE & LANTZ, Attorneys for
ALEXANDER STEPHENS.

E. QUACKENBACH, Attorney for SIDNEY
COLLINS..

ALLEN, WINSTON & ALLEN, Attorney for T. S.
LANE.

WAKEFIELD & WITHERSPOON, Attorneys for
DAVID ACKERMAN, STANLEY HODG-
MAN and AUGUSTA W. HOWELL.

NETERER, District Judge.—Equity will treat alike those similarly situated.

In re Toole, 274 Fed. 342. Creditors of equal equities are in the same class, and the omission of some to make specific claim does not enlarge the right of such as do make claim, In re Pearson, 233 Fed. 519, since the claimant must recover on the strength of his own title, In re Pearson, *supra*; Duel v. Hollis, 241 U. S. 523; In re [39] J. C. Wilson & Co., 252 Fed. 631. The securities "lacked individuality, and like facsimile storage receipts for gold coin could properly be treated as indistinguishable tokens of identical value," when issued by the same obligor, Duel vs. Hollis, *supra*. There are several classes of claimants, but I think under the stipulation, those holding securities of the same class, stand in the same relation to the fund which they claim. As between the claimants there is no difference between the fully paid and the partially paid securities, since the sale in either event was complete and title vested, and unpaid securities being held as collateral does not change the status. It is unnecessary to determine whether Lane and Theis had traced their stock into the fund in issue in view of the conclusion arrived at, the holders of a particular security being in a separate class, Duel vs. Hollis, *supra*. Each petitioner is therefore entitled to recover the *pro rata* of the fund as the security held by him bears to the total of such security sold by the receiver issued by the same obligor. The holdings as per stipulation are as follows: Ackerman, Loew's

Theatre, 100 shares; Stephens, New Cornelia, 30 shares; Wittmer, Middlestate Oil, 52½ shares; Mabel Connor, Nor. Pac. 5 shares; Maud Mower, Nor. Pac. 23 shares; Lantor, Nor. Pac. 20 shares; Woodland, Nor. Pac. 15 shares; Hazel Mower, Nor. Pac. 5 shares, Rubber 5 shares, 1 \$1000 C. M. St. P. Bond maturing in 1925; 1 \$1000 Chile Copper bond, maturing 1932; Ream, Pure Oil, 50 shares; Hodgman, C. R. I. & Pac. 5 shares; Theis, Amer. H. & Leather, 30 shares; Lane, \$2000 Inter. Tel. Sales & Tel. Sales & Eng. bond; Howell, Gen. Elec. 10 shares. The amount due from the respective holders of named securities which has not been paid shall be deducted from the amount due each and retained by the trustee. I do not think that Lane or others are estopped from asserting this claim, because they filed a general claim. The order of the Referee is set aside and the matter is referred to the referee to make the computations, and order of allowance as indicated.

NETERER,

U. S. District Judge.

Filed in the U. S. District Court, Eastern District of Washington. July 21, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [40]

In the United States District Court for the Eastern
District of Washington, Northern Division.

No. 3812—IN BANKRUPTCY.

In the Matter of IRVING WHITEHOUSE
COMPANY,

Bankrupt.

Order on Review of Referee's Decision.

This cause came on regularly for hearing before the undersigned, one of the Judges of the above court, on the petition of the Trustee for a review of the order made by Hon. Sidney H. Wentworth, Referee of this court, on the petitions of David Ackerman, Stanley Hodgman, L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Oscar Lantor, Maud Mowers, Chas. Theis, Alexander Stephens, Augusta W. Howell, Thaddeus S. Lane and O. W. Wittmer, for an order directing the Trustee in Bankruptcy to deliver to said petitioners certain securities, or the proceeds realized therefrom, the Trustee W. S. McCrea appearing by his attorneys Danson, Williams & Danson, the petitioners L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland and Maud Mowers appearing by their attorneys Graves, Kizer & Graves, the petitioner Oscar Lantor appearing by his attorney S. Edelstein, the petitioner Chas. Theis appearing by his attorney Fabian B. Dodds, the petitioner Alexander Stephens appearing by his attorneys McCarthy, Edge & Lantz, the petitioner O. W. Wittmer appearing by his attorney E. B. Quacken-

bush, the petitioner Thaddeus S. Lane appearing by his attorneys Allen, Winston & Allen, and the petitioners David Ackerman, Stanley Hodgman and Augusta W. Howell appearing by their attorneys Wakefield & Witherspoon, and the court having heard the arguments and having taken the cause under advisement, and having heretofore, and on July 18, 1923, filed its decision in writing, and being now fully advised in the premises, [41]

IT IS ORDERED, that the said order of the said Referee be, and the same is reversed and set aside and the Referee is directed to make computations and order of allowance as follows: From the indebtedness due from the Bankrupt to E. F. Hutton & Co., for which the securities sold after August 3, 1921, were held as collateral, there be deducted \$1,414, the amount realized from the sale of the securities owned by the bankrupt and to which the Bankrupt's customers had no claim; that thereafter there be applied to the payment of the indebtedness due to Hutton & Co. from the proceeds realized from the sale of all the remaining securities, a *pro rata* share from all such securities so far as necessary to the satisfaction of the Hutton & Co. claim. If the interest of the bankrupt in any particular security is not sufficient to pay the *pro rata* indebtedness of such security to Hutton & Co. the deficiency thereof be supplied from the interest of the owners of the remaining of such security, but if the interest of the bankrupt is sufficient to pay the *pro rata* indebtedness of such security then the balance of the remaining

of the proceeds realized from the sale of each security be ordered paid to any petitioner owning such security, according to his ownership, and where there are several owners to a particular security, that the balance to the credit of such security be prorated according to such ownership, after deducting any indebtedness due from such owners for the purchase of such security.

IT IS FURTHER ORDERED, That none of the said petitioners are estopped from asserting their claim through having filed general claims.

Dated this 28th day of July, 1923.

JEREMIAH NETERER,

District Court Judge.

Filed in the U. S. District Court, Eastern District of Washington. July 31, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [42]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3812—IN BANKRUPTCY.

In the Matter of IRVING WHITEHOUSE COMPANY, a Corporation,

Bankrupt.

Petition for Appeal.

L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Maude Mowers, Oscar Lantor, Charles Theis, Alexander Stephens, O. W. Wittmer, T. S. Lane, David Ackerman, Stanley Hodgman and

Augusta W. Howell, feeling themselves aggrieved by the order of this court made and entered herein on the 31st day of July, 1923, do hereby appeal from said order adjudging the Trustee to have an interest in the fund derived from the securities pledged by Hutton & Company and reversing the order of the Referee to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignments of error filed herein, and pray that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in the State of California.

Dated this 6th day of August, 1923.

GRAVES, KIZER & GRAVES,

Attorneys for L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland and Maude Mowers.

S. EDELSTEIN,

Attorney for Oscar Lantor.

FABIAN B. DODDS,

Attorney for Charles Theis.

McCARTHY, EDGE & LANTZ,

Attorneys for Alexander Stephens. [43]

E. B. QUACKENBUSH,

Attorney for O. W. Wittmer.

ALLEN, WINSTON & ALLEN,

Attorneys for T. S. Lane.

WAKEFIELD & WITHERSPOON,

Attorneys for David Ackerman, Stanley Hodgman and Augusta W. Howell.

Filed in the U. S. District Court, Eastern District of Washington. August 7, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [44]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3812—IN BANKRUPTCY.

In the Matter of IRVING WHITEHOUSE
COMPANY, a Corporation,
Bankrupt.

Order Allowing Appeal.

The foregoing petition of L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Maude Mowers, Oscar Lantor, Charles Theis, Alexander Stephens, O. W. Wittmer, T. S. Lane, David Ackerman, Stanley Hodgman and Augusta W. Howell, for an appeal from that certain order made and entered in the above-entitled proceeding in bankruptcy on the 31st day of July, 1923, to the United States Circuit Court of Appeals for the Ninth Circuit is hereby granted and allowed, and the appeal bond is hereby fixed at one thousand dollars.

WM. B. GILBERT,
Circuit Judge.

Filed in the U. S. District Court, Eastern District of Washington. August 7, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [45]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3812—IN BANKRUPTCY.

In the Matter of IRVING WHITEHOUSE
COMPANY, a Corporation,
Bankrupt.

Assignments of Error.

Come now L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Maude Mowers, Oscar Lantor Charles Theis, Alexander Stephens, O. W. Wittmer, T. S. Lane, David Ackerman, Stanley Hodgman and Augusta W. Howell and say that in the order made and entered in the above-entitled proceeding on the 31st day of July, 1923, there is manifest error, and file the following assignments of error committed and happening in the said proceedings upon which they will rely in their appeal from said order.

1. In reversing the order of the Referee.
2. In refusing to affirm the order of the Referee.
3. In adjudging the Bankrupt or the Trustee entitled to any portion of said fund until after these claimants had been paid in full.
4. In failing and refusing to order said fund to be the property of said claimants so far as necessary to pay them in full.
5. In failing and refusing to order all other claimants estopped from claiming any part of said fund.

6. In failing and refusing to hold said show cause order the proceedings thereunder barred any other claimants to any part of said fund.

7. In failing and refusing to order that the said Trustee had no property right in said fund.

8. In failing and refusing to order the entire indebtedness of Hutton & Company to be paid from any interest the Bankrupt or the Trustee might have in said securities, or any of them. [46]

9. In ordering these claimants, or any of them, to pay any of the sum due Hutton & Company.

10. In ordering the interest of these claimants in said fund, or any part thereof, to be subject to the claim of Hutton & Company.

11. In ordering the interest of said claimants, or any of them to be prorated according to the ownership in each security after deducting any indebtedness, or to be prorated at all.

12. In failing and refusing to award to those claimants who identified their particular securities among those held in the Hutton & Company pledge the amount obtained for such securities on their sale.

13. In failing and refusing to award claimants who identified in the Hutton & Company pledge securities similar to those which the Bankrupt was under obligation to be holding for them, the full value of such a proposition of the identified securities as the number of shares each of such claimants were entitled to bore to the total amount

of such shares that the bankrupt was under obligation to be holding for all his customers.

GRAVES, KIZER & GRAVES,

Attorneys for L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland and Maude Mowers.

S. EDELSTEIN,

Attorney for Oscar Lantor.

FABIAN B. DODDS,

Attorney for Charles Theis.

McCARATHY, EDGE & LANTZ,

Attorneys for Alexander Stephens.

E. B. QUACKENBUSH,

Attorney for O. W. Wittmer.

ALLEN, WINSTON & ALLEN,

Attorneys for T. S. Lane.

WAKEFIELD & WITHERSPOON,

Attorneys for David Ackerman, Stanley Hodgman and Augusta Howell.

Filed in the U. S. Dist. Court, Eastern Dist. of Washington. August 7, 1923. Alan G. Paine, Clerk. By A. P. Rumburg. Deputy. [47]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3812—IN BANKRUPTCY.

In the Matter of IRVING WHITEHOUSE COMPANY, a Corporation,

Bankrupt.

Citation on Appeal.

United States of America,—ss.

The President of the United States to W. S. McCrea, as Trustee in Bankruptcy of the Estate of Irving Whitehouse Company, a Corporation, Bankrupt, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, on the 4th day of September, 1923, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the Eastern District of Washington in the Matter of Irving Whitehouse Company, Bankrupt, wherein L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Maude Mowers, Oscar Lantor, Charles Theis, Alexander Stephens, O. W. Wittmer, T. S. Lane, David Ackerman, Stanley Hodgman and Augusta W. Howell are appellants and W. S. McCrea as Trustee in Bankruptcy of Irving Whitehouse Company, Bankrupt, is the appellee to show cause, if any there be, why the order of the District Judge entered on the 31st day of July, 1923, reversing the order of the Referee entered on the 27th day of April, 1923, should not be corrected and speedy justice should not be done to the parties in that behalf. [48]

WITNESS the Honorable WILLIAM H. TAFT,
Chief Justice of the United States, this 6th day of
August, in the year of our Lord 1923.

WM. B. GILBERT,
Circuit Judge.

Attest:

_____,
Clerk.
By _____,
Deputy.

Copy of the within citation on appeal duly re-
ceived this 7th day of August, 1923.

DANSON, WILLIAMS & DANSON,
Attorneys for Trustee and Appellee. [49]

[Endorsed]: No. 3812—In Bankruptcy In the
District Court of the United States for the Eastern
District of Washington, Northern Division. In the
Matter of Irving Whitehouse Company, a Corpora-
tion, Bankrupt. Citation on Appeal. Filed in the
U. S. District Court, Eastern Dist. of Washing-
ton. Aug. 7, 1923. Alan G. Paine, Clerk. A. P.
Rumburg, Deputy. [50]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 3812.

In the Matter of IRVING WHITEHOUSE CO.,
a Corporation,
Bankrupt.

Praeipce for Transcript of Record.

To the Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division:

You are hereby requested, in preparing your return to the citation on appeal in the above-entitled cause, to include therein the following:

1. Stipulation in the case.
2. Order and Certificate of the Referee.
3. Memorandum of the District Judge.
4. Order of the District Judge appealed from.
5. Petition for appeal.
6. Order allowing appeal.
7. Assignments of error.
8. Citation.
9. Praeipce for transcript of record, which comprises all the papers, records or other proceedings than those above mentioned which are necessary to be included by the Clerk of said Court in making up his return to said citation as a part of such record. [51]
10. Bond on Appeal.

GRAVES, KIZER & GRAVES,
Attorneys for L. C. Ream, Hazel Mowers, Mabel
Connor, H. E. Woodland and Maude Mowers.

S. EDELSTEIN,

Attorney for Oscar Lantor.

FABIAN B. DODDS,

Attorney for Charles Theis.

McCARTHY, EDGE & LANTZ,

Attorneys for Alexander Stephens.

E. B. QUACKENBUSH,

Attorney for O. W. Wittmer.

ALLEN, WINSTON & ALLEN,

Attorneys for T. S. Lane.

WAKEFIELD & WITHERSPOON,

Attorneys for David Ackerman, Stanley Hodgman
and Augusta W. Howell.

Filed in the U. S. District Court, Eastern District
of Washington. August 7, 1923. Alan G. Paine,
Clerk. By A. P. Rumburg, Deputy. [52]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 3812.—IN BANKRUPTCY.

In the Matter of IRVING WHITEHOUSE COM-
PANY, a Corporation,

Bankrupt.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS
that we, L. C. Ream, Hazel Mowers, Mabel Connor,
H. E. Woodland, Maude Mowers, Oscar Lantor,
Charles Theis, Alexander Stephens, O. W. Wittmer,
T. S. Lane, David Ackerman, Stanley Hodgman
and Augusta W. Howell, as principals, and Ameri-
can Surety Company of New York, a surety com-
pany authorized to do business in this district, as
surety, acknowledge ourselves to be jointly and
severally bound unto W. S. McCrea, as Trustee in
Bankruptcy of the Estate of Irving Whitehouse

Company, a corporation, the bankrupt appellee in the above cause, in the sum of one thousand dollars, conditioned that

WHEREAS on the 31st day of July, 1923, in the District Court of the United States for the Eastern District of Washington, Northern Division, in a proceeding in bankruptcy depending in that court, wherein these principals were petitioners and the said W. S. McCrea, as such Trustee, was respondent, an order was entered against these said principals, and these said principals have obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and filed a copy thereof in the office of the Clerk of the Court to reverse the said order and a citation directed to the said W. S. McCrea, as such Trustee, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, State of California,

NOW if the said parties hereinbefore named shall prosecute this appeal to effect and answer all damages and costs if they fail to make their [53] plea good, then the above obligation to be void, else to remain in full force and virtue.

H. E. WOODLAND, MAUDE MOWERS, L. C.
REAM, HAZEL MOWERS, MABEL CON-
NOR,

By PAUL H. GRAVES,

Their Attorney.

OSCAR LANTOR,

By S. EDELSTEIN,

His Attorney.

CHARLES THEIS,
By FABIAN B. DODDS,

His Atty.

T. S. LANE,
By ALLEN, WINSTON & ALLEN,
His Attys.

ALEXANDER STEPHENS,
By McCARTHY, EDGE & LANTZ,
His Attorneys.

O. W. WITTMER,
By E. B. QUACKENBUSH,
His Atty.

DAVID ACKERMAN, STANLEY HODGMAN and
AUGUSTA W. HOWELL,
By WAKEFIELD & WITHERSPOON,
Their Attorneys.

[Seal]

AMERICAN SURETY COMPANY OF NEW
YORK,

By J. B. WRIGHT,
Resident Vice-president.

Attest: W. L. BERRY,
W. L. BERRY,

Resident Assistant Secretary.

Approved this 6th day of August, 1923.

WM. B. GILBERT,
Circuit Judge.

Filed in the U. S. District Court, Eastern District
of Washington, August 7, 1923. Alan G. Paine,
Clerk. By. A. P. Rumburg, Deputy. [54]

Certificate of Clerk of U. S. District Court to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, do hereby certify that the foregoing pages constitute and are a true, complete and correct copy of all the record, pleadings, testimony and all proceedings had in said cause, as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, and as is stipulated for by counsel of record herein, as the same remain of record, and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the order and decree of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, Seattle, Washington.

I further certify that I hereto attach and hereto transmit the original citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of Twenty-two Dollars and Twenty-five Cents, and that the said sum has been paid in full by Fabian B. Dodds, one of the attorneys for the petitioning creditors and appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court

at Spokane in said District this 16th day of August, 1923.

[Seal]

ALAN G. PAINE,
Clerk. [55]

[Endorsed]: No. 4075. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Irving Whitehouse Company, a Corporation, Bankrupt. L. C. Ream, Hazel Mowers, Mabel Connor, H. E. Woodland, Maude Mowers, Oscar Lantor, Charles Theis, Alexander Stephens, O. W. Wittmer, T. S. Lane, David Ackerman, Stanley Hodgman and Augusta W. Howell, Appellants, vs. W. S. McCrea, as Trustee in Bankruptcy of the Estate of Irving Whitehouse Company, a corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed August 22, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

*In the Matter of IRVING WHITEHOUSE COMPANY,
a Corporation, Bankrupt*

L. C. REAM, HAZEL MOWERS, MABEL
CONNOR, H. E. WOODLAND, MAUDE
MOWERS, OSCAR LANTOR, CHARLES
THEIS, ALEXANDER STEPHENS, O. W.
WITTMER, T. S. LANE, DAVID ACKER-
MAN, STANLEY HODGMAN, AUGUSTA
W. HOWELL, *Petitioners,*

vs.

W. S. McCREA, as Trustee in Bankruptcy of Irving
Whitehouse Company, a Corporation, Bankrupt,
Respondent.

No. 2075

*Appeal and Petition to Revise from the District
Court, Eastern District of Washington*

Appellants' and Petitioners' Brief

GRAVES, KIZER & GRAVES,
WAKEFIELD & WITHERSPOON,
ALLEN, WINSTON & ALLEN,
FABIAN B. DODDS,
JOSEPH McCARTHY,
SAMUEL EDELSTEIN,
E. B. QUACKENBUSH,
Spokane, Washington,
Solicitors for Appellants and Petitioners.

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STATEMENT OF THE CASE.

The proceedings on which this appeal is based were instituted by the various appellants to recover from W. S. McCrea, the Trustee in Bankruptcy of the Irving Whitehouse Company, stockbrokers, doing business in Spokane, the proceeds of certain securities, the property of appellants, which had been pledged by Irving Whitehouse Company with Hutton & Company, stockbrokers of New York. The appellants will hereafter be referred to as the "petitioners," or "claimants," Irving Whitehouse Company as "Whitehouse," and Hutton & Company as "Hutton." When amounts are referred to they will be stated in round figures unless the exact sum is material.

On August 3, 1921, a receiver was appointed by the State Court to take charge of the Whitehouse affairs, and on the 2nd of December, 1921, W. S. McCrea was duly appointed trustee in bankruptcy and is now acting in that capacity. All of these petitioners were customers of Whitehouse and on August 3, 1921, had pending open accounts with him. He had in his possession certain securities of each of these persons, and had pledged them with Hutton to secure advances made by that firm in buying and selling securities for him on the New York exchange. At the time of the appointment of the receiver, Whitehouse owed Hutton more than \$37,000, and Hutton held collateral security, including the securities of these petitioners, of a value in excess of \$48,-

000. Upon an order of the State Court, the receiver instructed Hutton to liquidate the Whitehouse account, and Hutton thereupon proceeded to sell all the pledged collateral. From such sale he received a surplus in excess of \$10,400 over the amount owed him, and this was forwarded to the receiver and later turned over to the trustee in bankruptcy.

Of the collateral held by Hutton but \$1414 was the actual property of Irving Whitehouse. The balance was composed of property belonging to persons who had paid their accounts with him in full and of property belonging to marginal customers, but by far the greater amount was the property of these marginal dealers (page 9 of Stipulation). It is stipulated in connection with the pledging of customers' securities that Whitehouse was not guilty of any wrongdoing in pledging the securities of marginal traders, but it is agreed that he was under the necessity of removing securities from the Hutton pledge and making delivery as soon as any customer paid his account in full, it being said on page 5 of the stipulation that "in all marginal dealings it was agreed between Irving Whitehouse Company and the customer that the securities purchased as well as the collateral put up by the customer to secure his account with the bankrupt might be rightfully repledged. * * * It was understood that if the amount due on any account was paid in full the bankrupt must at once deliver either the identical securities put up as collateral or purchased, or others exactly similar thereto."

The petitioners, Lantor (p. 10, Stipulation), Hodgman (pp. 11 and 12, Stipulation), Maude Mowers (p. 14, Stipulation), Ream (p. 14, Stipulation), Woodland (p. 14, Stipulation), and Howell (p. 18, Stipulation) had paid in full for their securities prior to the 3d day of August, 1921. Stephens had paid all but \$15 on his account and had refrained from paying the balance simply because of a misunderstanding between himself and the bankrupt as to the amount paid for the property he had ordered. Hazel Mowers (p. 12, Stipulation), Conner (p. 13, Stipulation), Lane (pp. 15, 16 and 17 of the Stipulation) and Theis (p. 17, Stipulation) had not voluntarily paid the full purchase price of their securities, but it is stipulated that in each of these cases Whitehouse had, prior to the 3d day of August, 1921, converted to his own use such a quantity of their securities, other than those now in question, that the amount previously due him in each case had been converted to an indebtedness due from him to the several petitioners. Ackerman (p. 11, Stipulation) had delivered stock to Whitehouse with the understanding that he was to loan it, on Ackerman's behalf, to Hutton, for the prevailing call money rate, without however authorizing Whitehouse to pledge the stock as collateral on his own account. In violation of this agreement the stock was included by him in the Hutton pledge.

The referee found that on the 3d day of August, 1921, O. W. Wittmer was a marginal trader who was still indebted to Whitehouse. He also found

that although H. Sidney Collins had paid in full for his securities they had been converted by Whitehouse prior to the failure, and on the 3d of August were not included in the Hutton pledge.

On the 23d day of January, 1923, a show cause order was entered requiring all persons who had any claims to the Hutton surplus to come before the referee on the 5th day of February, 1923, or be forever estopped from asserting their claims. No persons other than these petitioners appeared at that time, and the referee thereupon awarded to each of them the full value obtained for their securities on the sale by Hutton, with these exceptions: There were claims for 68 shares of Northern Pacific while there were but 30 shares of that stock in the pledge. Each Northern Pacific claimant was, therefore, awarded his proportion of the price obtained for these 30 shares. With respect to Wittmer, the marginal trader, since the fund was not sufficient by approximately \$300 to satisfy the claims of all petitioners, and since he was still indebted to Whitehouse on his account and had authorized the pledging of his stock, it was held that he was not entitled to share with the other petitioners, but might take only the surplus remaining after their claims were satisfied. H. Sidney Collins was denied any recovery at all, since he had failed to locate his property in the Hutton pledge.

The trustee appealed from the referee's order, and the District Court reversed it. An order was

thereupon entered that there should be applied to the payment of the indebtedness due Hutton a pro rata share from each security, and that, if the interest of Whitehouse in any security was not sufficient to pay the pro rata of indebtedness of such security, the difference should be supplied from the interest of the owners of the remainder of such security. Since in no case did Whitehouse own securities similar to any claimed by these petitioners, the provision that his interest should first be applied to release a portion of the indebtedness of such securities was of no avail, and the practical effect of the order was that all the securities pledged should bear jointly the burden of the lien, it being deemed immaterial whether they had been pledged rightfully or wrongfully.

This matter has been brought up to this court both by petition to revise and by appeal, because of the uncertainty as to just which method for review is proper in these particular cases (See Collier on Bankruptcy, 1923, Vol. 1, p. 829).

We are of the opinion, however, that the proper method is by petition to review.

In *re Francis Valentine Co.*, 94 Fed. 793; 98 Fed. 414 (this court).

As said in Collier's on Bankruptcy (*supra*) p. 838:

“Orders determining the rights of claimants to a fund in the possession of the bankruptcy court and being administered by it in

the course of bankruptcy proceedings, are reviewable by petition.”

Gibbons vs. Goldsmith, 22 Fed., 826 (this court).

In re Antigo Screen Door Co. (C. C. A. 2d Cir.) 123 Fed. 249.

Samel vs. Dodd (C. C. A. 5th Cir.) 142 Fed. 68.

Matter of Petronio (C. C. A. 7th Cir.) 220 Fed. 269.

In re Goldstein (C. C. A. 7th Cir.) 216 Fed. 887.

Whichever procedure is deemed proper in this Court, we submit and rely upon the following Assignments of Error.

1. In reversing the order of the Referee.
2. In refusing to affirm the order of the Referee.
3. In adjudging the bankrupt or the trustee entitled to any portion of said fund until after these claimants had been paid in full.
4. In failing and refusing to order said funds to be the property of said claimants so far as necessary to pay them in full.
5. In failing and refusing to order all other claimants estopped from claiming any part of said fund.
6. In failing and refusing to hold said show cause order and the proceedings thereunder barred any other claimants to any part of said fund.
7. In failing and refusing to order that the said Trustee had no property right in said fund.

8. In failing and refusing to order the entire indebtedness of Hutton & Company to be paid from any interest the bankrupt or trustee might have in said securities, or any of them.

9. In ordering the interest of these claimants in said fund, or any part thereof, to be subject to the claim of Hutton & Company.

10. In ordering these claimants, or any of them to pay any of the sum due Hutton & Company.

11. In ordering the interest of said claimants, or any of them, to be pro rated according to ownership in each security after deducting any indebtedness, or to be pro rated at all.

12. In failing and refusing to award to those claimants who identified their particular securities among those held in the Hutton & Company pledge the amount obtained for such securities on their sale.

13. In failing and refusing to award the claimants who identified in the Hutton & Company pledge securities similar to those which the bankrupt was under obligation to be holding for them, the full value of such a proportion of the identified securities as the number of shares each of such claimants was entitled to bore to the total amount of such shares that the bankrupt was under obligation to be holding for all his customers.

ARGUMENT.

Those persons whose securities were wrongfully included by Whitehouse in the Hutton pledge have the highest equities in any surplus remaining over.

As appears from the stipulation, Whitehouse had pledged to secure his own indebtedness, a small block of stock belonging to himself; a large number of securities belonging to margin dealers, who consented to such hypothecation, and the stocks and bonds of other persons who had not authorized him to pledge their securities. It is obvious that the last class of persons have rights to any surplus that may remain over, superior to the claims of all other persons, and it appears from the stipulation that each of these petitioners with the single exception of O. W. Wittmer, is included in this class.

Courts that have considered the distribution of funds similar to that now in question, have been unanimous in awarding to those persons whose securities have been wrongfully subjected to the perils of such pledges any surplus that might remain over after the lien of the pledgee was satisfied and have divided among those who consented to the pledging of their securities only so much as remained after the first class had been satisfied in full.

One of the earliest and most widely cited cases

recognizing this principle, is that of *Skiff vs. Stoddard*, 63 Conn. 216, 21 L. R. A. 102. An action was brought by customers of insolvent brokers against the trustee to recover a surplus remaining after the satisfaction of a lien such as that of Hutton. The Court decided that, as between the customers of the brokers and the trustee, the customers who had located their securities in the pledge were entitled to the surplus. It then had occasion to discuss the claim of one Hooker, who had found certain of his securities pledged, although he had given the brokers no authority to make such hypothecation, and, since the fund was not sufficient to satisfy all claimants, it became necessary to determine whether he should pro rate with the balance of the customers, who had given authority to pledge, or should take in preference to them. On this point it was said in 21 L. R. A. 117:

“We fail to discover in the record that Hooker ever gave Bunnell & Scranton any express authority to pledge his stocks, and we discover nothing from which an implied authority so to do can be in any way inferred. A pledgee in the absence of authority, expressed or implied, is not permitted to repledge as security for his own debt. Upon the facts appearing in the record, therefore, Bunnell & Scranton’s action in hypothecating Hooker’s stocks must be regarded as wrongful. The stocks pledged with his were rightfully pledged. They were either stocks of the wrongdoers and debtors, or stocks of a customer who had authorized a repledging. The plaintiff’s equity is, therefore, superior to that of the owners of the other stocks, and it is right to have an

application of their proceeds "to the discharge of the pledge, before he shall be called upon to bear a burden imposed upon his property by the wrongful acts of his bailee."

Another case in point is *In re Mills*, 110 N. Y. Supp. 314. The brokers had pledged, as here, securities belonging to customers, by name, Beach, Henck and Townsend. The last two had authorized a re-hypothecation, but Beach had not. The pledgee satisfied its lien by selling all the securities of Beach and only a portion of the securities of Henck and Townsend. Beach contended that since their securities were rightfully exposed to the perils of the pledge, while hers were not, she was entitled to a lien against the property that survived, and her contention was sustained in the following language:

"When the Colonial Bank (the repledgee) made the sale, had Mrs. Beach been advised of it, she would have had a right to insist that all of the securities which had been rightfully delivered to the bank be sold to pay the loan before her securities were resorted to, and, if a sufficient fund had been derived from the sale of the other securities to pay the loan, the bank could not have sold her securities and would have had to deliver them to her. In other words, it would have been the duty of the bank, had it been advised of the facts, to have sold the securities of the appellants, Henck and Townsend before selling hers. This is what ought to have been done, and, inasmuch as a court of equity will consider that done which should have been done, it will now direct that the stocks of Henck and Townsend be sold and the proceeds be turned over to her, in so far as

it may be necessary to make good to her the loss which she sustained by the unauthorized sale of the 300 shares of the steel stock."

To the same effect are the cases of *In Re Ennis*, 187, Fed. 720 and *In re Wilson*, 252 Fed. 631, which are also of interest on another phase of the question herein involved, and which we may here discuss without digressing from the subject under consideration. There can be no question, but that the securities of Lantor, Hodgman, Maude Mowers, Ream, Woodland, Howell and Stephens were wrongfully pledged by Whitehouse, since it is stipulated that they had paid in full, and, since it was further stipulated that, when full payment was made, the broker was under the immediate necessity of delivering the customers' property. Also, as concerns Ackerman, it was stipulated that he had not authorized a pledge of his stocks by Whitehouse.

Some question might, however, be raised as to Whitehouse's right to pledge the securities of Hazel Mowers, Mabel Conner, T. S. Lane and Chas. Theis. Each of these had been, at the outset, margin dealers, but in each case it is stipulated that prior to the failure the bankrupt had misappropriated such a quantity of their securities as to convert their debit balances to credit balances in their favor and that, in addition, he still retained the unconverted balance of their securities in the Hutton pledge.

It has been settled that in such cases as these last mentioned the wrongful acts of the broker

deprived him of any right to hold the securities in pledge and that, after his conversion, the property of such persons must be considered as held in pledge without authority and that consequently they have equities equal to those of the customers whose property was wrongfully pledged from the outset. The first case to this effect is *In Re Ennis*, 187 Fed. 720. There, as in the case of the last named petitioners, Bamford, the claimant, had been a marginal trader and had deposited with the brokers 82 shares of Safety Car Heating stock; 30 shares of Patterson Saving Investment stock and an undisclosed number of shares of Shoe Machinery stock. Prior to the broker's failure, he had misappropriated the Shoe Machinery stock. The pledgee had satisfied his lien by the sale of certain securities, including the 82 shares of Safety Car Heating stock, and turned over to the trustee, a surplus fund and the 30 shares of Patterson Savings Investment stock. The petitioner was awarded the recovery of his stock, "subject to the payment of his proportion of the burden of the loan." This condition is explained on page 721 as follows:

"The condition, 'subject to the payment of his proportion of the burden of the loan,' attached by the master to the order in the appellant's favor seems to mean substantially this: The Master awarded relief to two classes of claimants for securities or proceeds—Class 'A' and Class 'B.' Claimants placed in Class 'A' were held entitled, by reason of superior equities, to the specific restitution of their securities, or were awarded a lien on said surplus fund

for the amount of the proceeds of their securities, without contribution, except for expenses. The fund was insufficient to pay all claimants upon this basis, so that the claimants placed in Class 'B' in receiving less than their proportionate share of the fund, were said to contribute to the burden of the loan. The appellant was placed in Class 'B' and the primary contention made in his behalf is that he should have been put in Class 'A'."

It is interesting to note, by way of digression, that in the Ennis case the lower court recognized the difference between those whose securities had been wrongfully and those whose securities had been rightfully pledged and that the question there was simply whether or not it should be considered that Bamford's property had been improperly pledged so as to have entitled him to be included in the higher class, while in the present case, the Court has failed entirely to observe this distinction and has placed upon the claimants whose property was wrongfully pledged, the same burden as that placed upon Wittmer, whose property was rightfully pledged. But to return, it was Bamford's contention that the bankrupt, by its misappropriation of his Shoe Machinery stock, lost the right, which it admittedly had once had, to hold the balance of his stock in pledge and that, as the pledge was wrongful, he was entitled to be placed in Class "A." On this point, the court said:

At page 722:

"Broadly speaking, we approve what we consider to be the underlying principle of the

classification adopted by the 'Special Master, viz., that superior rights should be accorded to claimants whose securities have been wrongfully hypothecated by the bankrupts, over those whose securities have been rightfully pledged. When a broker pledges as collateral to his loan at a bank securities left with him for safe-keeping or for sale, he is a wrongdoer from the outset, and, while the bank may have the right to hold the securities, the claim of the owner, upon the satisfaction of the bank's demand, is of the highest equity. On the other hand, when a broker, acting under the authority conferred upon him by a customer, hypothecates his securities, the latter may, upon the adjustment of his account with the broker and the termination of the bank's demand, reclaim his securities; but, as he has no ground for complaining that his securities were pledged, his rights are clearly inferior to the owner whose securities were wrongfully hypothecated."

At page 723:

"Now, what were the rights of the parties with respect to the securities which the appellant placed in the hands of the bankrupts as securities for his speculative account? It is the better view in our opinion, that so long as the bankrupts, as brokers, fulfill their obligations to the appellant, as customers, they have the right to rehypothecate the securities pledged to them. That was substantially the only way in which the collateral could have been made available, and, in view of modern business conditions, we think that such use must have been within the contemplation of the parties. But it must be equally true that if the bankrupts converted to their own use the stocks of the appellant which they were carrying for him, or misappropriated the property deposited with them, they violated the duties which they owed

him and their right to use the securities for their benefit terminated.”

At page 724-5:

“For these reasons, we are of the opinion:

(1). That the hypothecation of the shares in question was not necessary for the purposes for which they were deposited with the bankrupts.

(2). That the bankrupts, by their misconduct in misappropriating the Shoe Machinery stock belonging to the appellant, lost their right to the continued use of his other property.

(3). That the bankrupts, by the conversion of the appellant's ‘long’ securities and failure to carry them, lost their right to the continued use of collateral deposited as margin on stocks to be actually carried.

(4). That for some time prior to the failure the bankrupts owned the appellant the duty of withdrawing the securities in question from the pledge in the Mechanics’ Bank and of surrendering them to him.

(5). That, consequently, the securities in question at the time of the failure, stood in the Mechanics’ Bank in the position of securities wrongfully pledged.

(6). And, as a corollary to these conclusions, we further hold that the equities of the appellant entitle him to be placed in Class ‘A,’ instead of Class ‘B’.”

It would seem, from a casual reading of the following case, *In Re Ennis*, 187 Fed. 726, which arose from the same matter, that Bamford was placed in Class “A,” because the conversion of his securities had been sufficient, as in the case of these petitioners, to convert his debit balance to a credit balance without taking into consideration the value of stock left in pledge and that Braun, in the latter

case, was placed in Class "B" because it appeared that, notwithstanding the conversion of some portion of his stock, it had not been made to appear that such conversion had wiped out his indebtedness so that consequently the bankrupt had a lien against the securities left with him which entitled him to repledge them. These two cases have been harmonized in the case of *In re Wilson*, 252 Fed. 631 in the Court's discussion of Godwin's case, pages 642-650. The claimant, as here, had been a marginal trader and had pledged with Wilson, the broker, a large number of stocks. Wilson had repledged all and had converted a portion, but not such a portion as to wipe out Godwin's indebtedness to him, if the value of the other securities, which had been repledged but not converted, was left out of consideration. The Court points out that there is no conflict between the two Ennis cases, but that the true rule is that, if, upon a restatement of the entire account of the customer, it appears that there is a credit balance in his favor and that some portion of his securities have been converted, he will be entitled to be grouped in Class "A," irrespective of whether or not the conversion has been sufficient per se to wipe out his debt. Whether these cases can be so harmonized, is not of importance here, since it was stipulated that the conversion of these petitioners' securities had in each case been sufficient, per se to wipe out the debit balance due from each of them. Therefore, all these cases are clearly to the effect that Hazel Mowers, Mabel Con-

ner, Lane, and Theis are entitled to be grouped with the other petitioners in Class "A."

See page 650 of the Wilson case, where it is said:

"First: As between securities hypothecated with authority and those hypothecated without authority, obviously the latter have the superior equity.

Second: Where securities are hypothecated without authority, or, though hypothecated with authority, are in part subsequently converted, the securities remaining stand on equal equities, provided that, as the result of the conversion of securities originally rightfully hypothecated, the restatement of the whole account shows a credit balance in favor of the customer.

Third: Where securities have been rightfully hypothecated, and there has not been any conversion of any of such securities, then the equity of the customer owning such securities is inferior to that of customers owning securities as described in paragraph first and second."

The cases cited below are in harmony with those just referred to.

In re Hollins, 232 Fed. 124.

In re Stringer, 230 Fed. 177.

In re Stringer, 233 Fed. 799.

In re Toole, 274 Fed. 337.

Harmon vs. Sprague, 163 Fed. 486.

In *In re Hollis* supra, it is said:

"When a bankrupt has made a loan, and to secure the same has pledged his own securities, securities of his customers rightfully, and securities of his customers wrongfully, the customers become sureties for him as principal to the lender. The securities must in equity be applied to the payment of the loan as follows: First, the bankrupts; Second, the customers'

securities rightfully pledged; and, Third, the customers' securities wrongfully pledged."

The petitioners have identified their securities in the Hutton pledge. It appears from the stipulation that the great majority of the other securities pledged were the property of marginal dealers who had authorized Whitehouse to deal with their property in the manner followed. Hence, it appears, under the cases cited above, that these petitioners have proved that they stand in the most favorable position possible. It should seem, therefore, that they have clearly established, as between themselves and the Trustee, who, in so far as this fund is concerned, stands in the shoes of Whitehouse, the wrongdoer, that they are entitled to the proceeds of their property. They have, however, gone further than to prove themselves possessed of the highest equities, and have proved that they hold not only the most favorable position possible, but that there are no other persons who can assert any right to this fund.

On January 23, 1923, the Referee entered an order directed to all persons who claimed any portion of this fund, ordering them to show cause before the 5th day of February, 1923, why the fund should not be disbursed to the petitioners, and further providing, that the service therein contemplated should be sufficient to bar all claimants from asserting any right to the aforesaid fund who did not appear to prove an interest therein on the return day. The procedure followed was customary and has always

been held effective:

See

In re Ennis, 198 Fed. 391.

In re Lathrop, Haskins & Co., 223 Fed. 912.

In re Gay & Sturgis, 224 Fed. 127.

In the case of Lathrop, Haskins & Co., at page 117, it is said:

“This brings us to inquire whether the District Court had the power to make the order of March 24th, providing that all claimants who did not file ‘notice of claims to the said stock’ on or before May 1, 1910, should be forever barred from making any claim or asserting any title or interest in or to any of the stocks, bonds, or securities of this estate or the proceeds thereof.’ In answering that question it is to be observed that the order expressly provided that it was ‘not to be construed to bar any creditor from his right to file a proof of claim as general creditor against this estate within one year after the order adjudicating the above named bankrupts.’ In other words, the order did not fix a time for general creditors to file claims against the estate. That the court could not have done as the Bankruptcy Act, in providing in Section 57, subd. ‘n’ that ‘claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication,’ plainly implies that creditors shall be entitled to file claims against the estate at any time within the year. But the Court sought by its order to require persons claiming stocks or bonds then in the possession of the receiver, or which might subsequently come into his possession, or in the possession of the trustee, to give notice of their claims within a time specified or be barred of the right to recover them from the receiver or trustee. We are at a loss

to understand why the authority of the court to make such an order should be denied. It is said that such an order is in effect a short statute of limitations, and that as such beyond the power of the Court to establish. In making the order the court was in the exercise of its equity jurisdiction. The equity courts, in jurisdictions where the distinction between law and equity is maintained, while not bound by statutes of limitation not in totidem verbis applicable to equitable demands, have nevertheless from the earliest times asserted the right to adopt and apply statutes of limitation to cases over which their jurisdiction was concurrent with that of the courts of law. And in cases over which the courts of equity have exercised an exclusive jurisdiction they have acted upon the maxim '*vigilantibus non dormientibus aequitas subvenit*' and recognized laches as a defense peculiar to the chancery courts, and refused to grant relief to one who has unduly delayed the prosecution of his claim. And it has also been the practice of equity courts in appointing receivers to limit the time within which claimants could assert a claim against the receivers so appointed. In the exercise of the right thus to limit rights of action the equity courts have not derived their power from any statute but have exercised an inherent power. It is too late, in the history of these courts to challenge their right in this respect."

In concluding the discussion of our theory of recovery, let us for a moment forget the fact that we are dealing with a case involving stockbrokers and their customers. Let us suppose a case exactly similar, but involving a different business and the pledging of different forms of property. Suppose the customers of a furniture dealer left in his pos-

session, for repair, furniture, and that he, in violation of his trust, pledged it or otherwise encumbered it and that the person who accepted the pledge acted in good faith, that thereafter the furniture dealer failed and a trustee was appointed. Would it be supposed for a moment that the trustee would be entitled to any surplus that might remain after the claims of the pledgee were satisfied as against the creditors of the furniture dealer, who had identified articles of household furniture in the pledge? Suppose a stronger case and one more nearly in point; one of the customers of the dealer finds in the pledge certain tables and chairs belonging to him. A surplus remains over, and he institutes proceedings in rem to establish his interest in it. Service is duly had on all other persons who might in any way be interested in this fund and none of them put in an appearance. Would it in such case be contended that the trustee who had received the surplus, merely because there was no one else to pay it to at the time it became available, that he, who stands in the shoes of the dealer who has defrauded his customer in pledging the property, has an interest or may assert any claim against the customer who has thus established his rights? And if this be true of the case supposed, wherein does the case now before the court differ?

The District Court erred in conceiving that the doctrine laid down in the Pierson case was applicable to the situation now before the court:

It was the Trustee's theory that these petitioners

must bear equally with all other persons whose securities were included in the Hutton pledge the burden of its lien, or, in other words, that there must be equal contribution among all such persons, and that, if the owners of the other securities failed to put in an appearance, the trustee by some mystic metamorphosis of title took their interest in the fund. He relies on the case *In re Pierson*, 238 Fed. 142 to support his contention.

To obtain any proper appreciation of the holdings of this case, it is necessary to review the several earlier cases leading up to it. Four claimants, Van Tynn, Vreislander, Levy, and Quinn sought to recover the surplus of certain securities belonging to them which they claimed to have identified or traced in a pledge, similar to this. They did not identify their stock by certificate numbers or in any other definite fashion, but contented themselves with proving that they were entitled to a certain form of security and that similar securities were included in the pledge in question. It was their belief that this was a sufficient identification of their property, under the case of *Gorman vs. Littlefield*, 229 U. S. 19. The District Court held, however, in 225 Fed. 889 that the case under consideration was distinguishable from *Gorman vs. Littlefield* in the following respect: There the claimant, although he was unable to identify his property positively, as by certificate numbers, found a block of stock sufficient to satisfy, not only his claim, but the claims of all other long customers of the bankrupt, while in the case at bar,

although there was enough on hand to cover the amounts actually claimed, yet the amount was not sufficient to cover the demands of all long customers of the bankrupt, and the court held that in such case there could be no presumption that the property was being held for the bankrupt's customers, and that hence there was no identification of the property in the pledge. The District Court was affirmed in 233 Fed. 519, where it was said:

“The rationale of the decision (*Gorman vs. Littlefield*), is that if the receiver has enough or more than enough, of the particular stock to cover all customers who were long on the day of the failure, then the presumption that he intended to keep their stock on hand is sufficient identification of the stock, or of so much of it as is needed, as theirs. If, however, the stock on hand, though sufficient to cover all actual claims, is not sufficient to cover all the long customers, no such presumption arises.”

Very shortly after this opinion had been handed down, a similar state of facts were brought to the attention of the Supreme Court in the case of *Duel vs. Hollins*, 241 U. S. 523. Here the stock found was not sufficient to cover the claims of all long customers. The Court held that the principle of *Gorman vs. Littlefield* nevertheless applied and permitted each claimant to recover the value of such a number of shares as the amount he was entitled to bore to the amount all long customers were entitled to. Application of the rule was made as follows: There were four persons who were long in the particular security. Bamberger was entitled

to 30 shares; Duel, 100; Weiner, Levy & Company, 50, and Landau, 100, the total being 280. There were but 100 shares on hand. Apparently only Duel and Weiner, Levy & Company made any claim to the stock. It was therefore held that Duel had identified 100/280 of the one hundred shares and that Weiner, Levy & Company had identified 50/280 of the one hundred shares and that each would receive the proceeds of the amounts thus identified.

When this opinion was handed down, the Pierson case was again called to the attention of the Circuit Court of Appeals in 238 Fed. 142 and the previous opinion was overruled. It was then held, as in *Duel vs. Hollis*, that the four claimants had identified and were entitled to receive their "pro rata shares of the respective stocks on hand" and that the proportion which they would be considered as having identified could not be increased by the fact that other customers had made no claims.

It must be apparent that this case does not give any support to the Trustee's contention and the order sought to be reviewed. No question is involved of any contribution among the various persons whose securities were identified in the pledge. An examination of the cases leading up to it shows that the only question raised was whether the petitioners had identified or traced their securities in the pledge, and this question of identification was the only one involved. The holding is that where there are insufficient securities in the pledge to meet

the claims of all long customers, each petitioner will be considered to have identified but his proportion of those on hand.

A similar case might easily have arisen in the present proceedings in the case of Northern Pacific stockholders. There were long customers of Whitehouse entitled to 68 shares of this security; Hazel Mowers claiming 5 shares; Mabel Conner, 5; H. W. Woodland, 15; Maude Mowers, 23, and Hodgman 20 shares, and there were on hand in the Hutton pledge but 30. The Referee held that each had identified his proportion of the security, for instance, Hazel Mowers identified $5/68$ of the 30 shares and received the value of such identified shares of stock; Woodland identified $15/68$ of 30 shares and received the value of these shares. Suppose, however, that Hazel Mowers had alone made a claim and that the others had not come before the Court. It is apparent that in such case it could not be held that she had identified a greater proportion of the stock than if all the others were before the Court.

The Pierson case then simply goes to the question of what is necessary to identify securities in the pledge. No question of contribution or of classification, according to the equities of those who have identified or traced their securities, is raised. Indeed it is not until after the securities have been traced in the pledge and the proper amount of securities so traced have been awarded to the various claimants, that there can be any grouping into

classes "A" and "B." And from this it is evident that the application of the doctrine of the Pierson case is a step preliminary to the classification of the petitioners, according to their equities. As is said *In re Wilson*, 252 Fed. at page 653-654:

"Where, by reason of conversion, less shares of a certain stock are found 'in the box' than are necessary to satisfy the claims of 'long' customers, the procedure is first to trace. If a claimant identifies his stock by certificate number, etc., he is entitled to reclaim that stock or its proceeds. After such specially identified shares are withdrawn from the total of shares, the remaining claims will be pro-rated under *Duel vs. Hollis*, supra. *After the proper pro-rata has been assigned to each claimant who has successfully traced, then the equities of the claimants will be considered, in order to determine whether the claim falls under Class 'A' or class 'B'.*" (Italics ours.)

It must be apparent from the foregoing that there is nothing in the Pierson case to warrant the assertion that it supports the Trustee's position. There seems to be no support for it in the authorities, is there any in reason or in equity? His claim is that all persons whose securities were held in the pledge must contribute, to release its lien, a proportion based upon the value of their securities. This, undoubtedly, would be true, if all the persons stood in the same position, if all asserted their claims, and if the fund was insufficient to satisfy the demands of all, but these circumstances do not here exist. The Trustee has at all times failed to take into consideration the fact that all the petitioners, with the single ex-

ception of Wittmer, are Class 'A' claimants, that is, are persons whose securities were wrongfully placed in the Hutton pledge and has likewise failed to take into consideration the fact that the surplus is more than sufficient to satisfy all such claims. It should be apparent that there can be no claim of contribution between such persons and those who voluntarily placed their property in the Hutton pledge, and that as between Class 'A' claimants there is no necessity of contribution, since the funds on hand are more than sufficient to satisfy their demands.

In the case of *In re Toole*, 274, Fed. 337, the court discusses the circumstances under which contribution is necessary. One Foster had been a margin dealer and discovered upon the failure of the broker that certain of his stock had been pledged. The pledgee did not sell all the collateral that he held, but, after satisfying his lien, returned to the Trustee a surplus fund together with certain securities including the stock of Foster. He thereupon brought suit for the immediate recovery of his property. At the time there was an omnibus proceeding instituted by a number of petitioners to recover their respective stocks, and the Lower Court ordered that the Foster claim be heard with the claims of the others and that the claim should be "determined in accordance with the rights and equities of those similarly situated." He appealed on the ground that since his property had actually survived the pledge, he was entitled to its specific return, but the Court held

that his claim should be consolidated with the others, saying that the mere chance that his property had survived should not place him in a better position than those whose property had been pledged with his under similar circumstances but, by mere chance, had been sold, and held that if it appeared that there were others who had the same equities and the fund was insufficient to satisfy all their claims, there should be a joint contribution. The court very clearly states the true rule governing the situations where contribution shall and shall not be enforced.

See pages 344 and 345, where it is said:

“We think that, when customers authorize their broker to pledge their securities for the payment of the broker’s debts, each becomes to the extent of his pledge a surety for the payment of such indebtedness. As between themselves they become co-securities. All the collateral lawfully so pledged is subject to the same obligation and lien. The owners of the collateral, being in effect cosureties, must be entitled to contribution from each other for any loss sustained if the stock of one is sold to pay the debt for which the stock of the other was equally liable. This right of contribution does not arise from the contract, as already said, but rests upon principles of equity and natural justice. The principle is that where all are equally liable for the payment of a debt all are bound equally to contribute to that purpose. So that if the stock of A. B. & C. is lawfully pledged for the payment of the debt of X, the stock of each is under the common burden, and if X sells the stock of A. and B., and leaves unsold the stock of C., the latter must contribute to A. and B. the

excess they have paid above their share. *But if, on the other hand, the stock of A. is lawfully pledged, while that of B. and C. is unlawfully pledged, there is no obligation on the part of B. and C. to contribute, for there is no common burden between A. on the one side and B. and C. on the other. The principle applies only in cases where the situations of the parties are equal as equality among persons whose situations are not equal is not equitable. (Italics ours).*

In conclusion, it is not amiss to give a resume of the situation. We have identified, in a certain pledge, our property, the major portion of which is as capable of a positive identification as the table and chairs in the supposed case. We have demonstrated that this property was wrongfully pledged, while the greater majority and possibly all the remainder was rightfully pledged. We have, by the show cause order of January 23d, 1923, shut off any other persons who might claim any interest in the fund and have established, if under such circumstances such fact may ever be established, that our interest is exclusive. This being true, must we be forced to deliver to the Trustee, who, in so far as these proceedings is concerned, stand garbed as the wrongdoer, Whitehouse, the lion's share of our property, under the guise that we are contributing jointly in bearing the burden of the pledge, with persons whose equities, had they come before the court, would have been held inferior to ours, and

who have been shut off from any claim of ownership?

Respectfully submitted,

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

In the Matter of IRVING WHITE-
HOUSE COMPANY,

Bankrupt,

L. C. REAM, HAZEL MOWERS,
MABEL CONNOR, H. E.
WOODLAND, MAUDE
MOWERS, OSCAR LANTOR,
CHARLES THEIS, ALEXAND-
ER STEPHENS, O. W. WITT-
MER, T. S. LANE, DAVID
ACKERMAN, STANLEY
HODGMAN, and AUGUSTA
W. HOWELL,

Appellants,

vs.

W. S. McCREA, Trustee of IRV-
ING WHITEHOUSE COM-
PANY, Bankrupt,

Respondent.

No. 4075

*On Appeal and Petition to revise, from the United
States District Court, Eastern District of
Washington, Northern Division.*

RESPONDENT'S BRIEF.

R. J. DANSON,
JAMES A. WILLIAMS,
ROBERT W. DANSON,
Attorneys for Respondent.

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Attorneys for Respondent.

STATEMENT.

Each of the claimants severally filed with the Referee in Bankruptcy a petition for an order directing the Trustee to deliver to such petitioner certain securities which it was alleged, were in the Trustee's possession, or in the event the securities could not be delivered, due to a sale having been made, for an order requiring the Trustee to pay to the several petitioners the amount realized from any such securities so sold. None of the securities in question ever came into the hands of the Trustee, but from the stipulated facts it appears that some securities, similar to those claimed by petitioners, were, on August 3, 1921, in the possession of E. F. Hutton & Company, of New York, the correspondent broker for the Bankrupt. On August 3, 1921, a Receiver was appointed over the Bankrupt, by the Superior Court of Spokane County, Washington. At the time the Receiver was appointed, the Bankrupt had with Hutton & Company securities which were soon thereafter sold for \$48,155.28. These securities were regularly held by Hutton & Company as collateral to secure an indebtedness due from the Bankrupt to it of \$37,690.01. Immediately after the Receiver was appointed he ordered Hutton & Company to sell the securities, which was done, the amount realized therefrom being \$48,155.28, or \$10,465.27 in excess of the indebtedness due Hutton & Company, and it is over this remainder that this contest is waged. It was stipulated that Hutton & Company, at the time the sales of the several securities were made, imme-

diately passed the amount received toward the liquidation of the indebtedness due it from the Bankrupt and that the amount received from the remainder of the securities, after its debt was paid, was remitted to the Receiver.

On November 7, 1921, a petition in bankruptcy was filed against said Irving Whitehouse Company, and on December, 1921, an adjudication in bankruptcy was made, and on January, 1922, Respondent was elected Trustee for said Bankrupt. Some time later the Receiver, appointed by the State Court, turned over to Respondent the money and property remaining in such Receiver's hands, and appellants seek through this proceeding to secure the entire \$10,465.27 so transmitted by Hutton & Company to the Receiver, and which they claim finally came into the hands of Respondent.

The securities, which were so held by Hutton & Company as collateral to its debt of \$37,690.01, and which were sold, were so sold on the dates and for the amounts as follows (Tr.):

1921		Dr.	Cr.
Aug. 3	Amount due from Bankrupt	\$37,690.01	
Aug. 5	International Nickel..	10.14	\$ 1,384.00
(X)	Loews Theatre.....	10.23	1,156.00
..	International Nickel..	10.24	2,718.00
	International Nickel..	10.53	342.85
	Willys Overland.....	10.53	654.00
(X)	New Cornelia.....	10.55	400.42
	Canada Copper.....	10.56	341.00
	Canada Copper.....	10.56	292.00

	Canada Copper.....	10.56	8.16
(X)	Middle States Oil.....	11.00	573.55
	General Electric.....	11.00	1,290.41
	Cerro De Pasco.....	11.00	488.02
	General Asphalt.....	11.00	2,659.25
	Midvale Steel.....	11.00	147.38
	Midwest (or Stand- ard Oil of Ind.).....	11.04	3,094.96
	Denny Oil.....	11.06	10.96
	Denny Oil.....	11.06	18.92
	Silver King of Ari- zona	11.08	.96
	Anglo American Oil....	11.10	44.71
	Mexican Petroleum....	11.27	1,055.61
	Kennicott Copper.....	11.27	424.01
	Missouri Pacific Pfd.	11.27	1,198.05
(X)	Northern Pacific Ry.	11.27	2,296.80
(X)	U. S. Rubber.....	11.27	725.34
	Pacific Oil.....	11.27	143.84
	General Motor.....	11.27	301.80
	Invincible Oil.....	11.27	175.73
	American Can.....	11.27	263.10
	American Sugar.....	11.27	1,849.68
	Cuban American Sugar	11.27	241.42
	Chili Copper.....	11.27	344.39
	Great Northern Ore.	11.27	277.25
	Sears Roebuck Scrip..	11.36	586.50
	Studebaker	11.47	337.34
	Willys Overland.....	11.47	282.26
	St. Paul Pfd.....	11.47	414.35
	Central Leather.....	11.47	658.70
(X)	Middle States Oil.....	11.53	27.05
	Columbia Grapha- phone	12.03	46.69
	Transcontinental Oil	12.11	375.50
	Allis Chalmers.....	12.11	623.70
(X)	Chili 6's.....	12.16	737.17
(X)	St. Paul 4's.....	12.16	769.69
	Sears Roebuck.....	12.27	974.03
	Pennsylvania Pete B	12.28	208.88
	U. S. Food.....	12.28	254.03

	United Pacific.....	12.28	119.46
	China Copper.....	12.29	382.04
	Greene Cananea.....	12.41	413.70
	General Motor.....	12.42	636.85
	Pennsylvania Ry.....	12.49	367.05
	Pierce Arrow.....	12.49	139.35
	Royal Dutch.....	12.49	762.63
	Chesapeake & Ohio....	12.49	556.85
	Can American Pete B	1.02	3.04
	General Electric.....	1.02	1.28
	Pullman Company.....	1.18	754.48
	Retail Stores.....	1.50	132.94
(X)	Pure Oil.....	1.51	655.35
	Westinghouse Electric	1.55	479.36
(X)	Chicago Rock Island	1.55	681.17
	Pullman Company.....	2.06	1,582.02
	To Balance....	\$ 1,196.01	
		38,886.02	38,886.02
<hr/>			
	Balance brot. down....		1,196.01
	Pure Oil.....	2.12	9.16
	Sullivan	2.27	612.15
	Montana Power.....	2.39	891.20
(X)	American Hide & Leather	2.40	760.28
	Southern Ry.....	2.43	196.85
	St. Paul Com.....	2.50	404.03
Aug. 5	Swift & Co.....		2,250.09
	Texas .....		.29
	Standard Oil of N. J. Com.		677.25
Aug. 6	American Beet Sugar	10.21	146.93
(X)	International Tel. Sales & Eng. 6-1924	11.16	1,519.32
	Certainteed Products	11.54	539.00
Aug. 8	Commerce, American Ship &.....	2.52	99.52
Aug. 9	United Smelting Pfd.	10.30	183.18

Aug. 9	Libby	11.39	24.98
Aug. 9	Sullivan	12.43	418.10
Aug. 16	Standard Oil of.....	10.19	536.93
To Balance Account..			\$10,465.27

In order to illustrate the situation better we have re-arranged the securities in the order of the date of the sales. The securities claimed by claimant are indicated thus: (X).

It is respondent's contention that none of the securities in which appellants were interested survived, and that in any event, they were entitled to no relief in excess of that granted by the order of the District Court. This order allowed claimants the value of the security of the same kind held by Hutton & Company on August 3, 1921, after deducting therefrom the pro rata part of the indebtedness due Hutton & Company, for which the security was held as collateral, first applying on this indebtedness the amount realized by Hutton & Company from those securities with Hutton & Company in which no customer was interested, amounting to \$1414.00. The theory of the order of the District Court was that while the petition in bankruptcy was not filed until November 7, 1921, yet for the purpose of determining the survival of securities, the condition as it existed at the time of the appointment of the State Court Receiver should be adopted.

It is respondent's further contention that should this court not agree with the order of the District Court, that none of the securities claimed by the claimants survived, with the possible exception of 3-4th's interest in

the American Hide and Leather stock claimed by appellant Charles Theis and the International Telephone Sales and Engineering 6-1924, claimed by T. S. Lane, and that none of claimants outside of Theis and Lane are entitled to any relief under this last theory. The reason why Theis would only be entitled to a 3-4th's interest in the American Hide and Leather stock, is that the Bankrupt should have been holding for said Theis 30 shares of said stock and for one Flagner 10 shares of the stock and Theis could not claim more than his proportion of such stock, or 3-4th's.

These securities which were held by E. F. Hutton & Company, were so held as the property of the Bankrupt. Hutton & Company did not know any of claimants in the transaction, or that they had, or claimed, any interest in such securities. To a large extent they were purchased for the Bankrupt on its order, or were securities which had been deposited with it by the Bankrupt, bearing proper endorsements. None of the securities were in any manner traced by claimants, except to the extent of showing that the Bankrupt should have held for their account a certain amount of such securities, and that the Bankrupt had no similar securities, except those with Hutton & Company.

Some of the claimants prior to August 3, 1921, had paid in full for the securities which they had purchased, and in some cases the debit balance of some of the claimants had been changed into a credit balance, through the conversion and sale by the Bankrupt of certain of the securities in which such claimants were interested.

The situation of claimant was not dissimilar from that of nearly all of the other creditors of the Bankrupt. The Bankrupt, at the time the Receiver was appointed was indebted in the sum of \$211,098.27, as the result of purchases made by customers from it of securities, which the Bankrupt was to, and did, purchase for the customer through Hutton & Company, but which securities were converted by the Bankrupt.

“As the result of these transactions, on the aforesaid date” (August 3, 1921), “Irving Whitehouse Company was indebted to its customers who were dealing in Eastern stocks and bonds through Hutton & Company, either on marginal or cash basis, in the sum of \$211,098.27, computed on the basis of what the securities would have been worth on said August 3, 1921.” (Tr. -----)

“Most of the said claims, amounting to \$211,098.27 were due to the fact that the Bankrupt had been paid the purchase price in certain instances in full for the purchase of the securities through Hutton & Company, which the Bankrupt did not deliver, or that the claimant had ordered on margin to be purchased through Hutton & Company, stocks or other securities and had put up collateral in the way of stocks or bonds with the Bankrupt, which the Bankrupt either sold or deposited with Hutton & Company as collateral for its account and such securities were sold by Hutton & Company and no accounting had with the customer.” (Tr. -----)

All of these securities held by Hutton & Company for the Bankrupts on August 3, 1921 as shown above were the property of the customers of the Bankrupt except as follows:

"Of all the securities above listed, Irving Whitehouse Company owned only the following, which sold at the price set below."

15 Royal Dutch	\$ 762.63
10 American Can Company.....	263.10
50 Transcontinental Oil	375.50
333 Canadian Copper	12.77
<hr/>	
Total	\$1,414.00

"The rest belonging to customers of Irving Whitehouse Company, by far the greater amount being the property of marginal dealers."

MOTION TO DISMISS APPEAL.

Respondent questions the jurisdiction of the Court and moves that the appeal of the appellants Stanley Hodgman, Mabel Connor and Alexander Stephens be dismissed, for the reason that the amount involved is less than the jurisdictional amount, as provided by Sec. 25a of the Bankruptcy Act.

Appellants seek to have the order made by the District Court reviewed both, by petition to revise, and by appeal. If appeal is the proper remedy, then we take it relief cannot be afforded by a petition to revise. Likewise, if an appeal is the proper remedy, the amount involved must be \$500.00 or more.

While the appeal has been taken by all of the appellants jointly, yet there were separate petitions for each of the appellants, and a joint order was made covering the claims of all of the appellants, as a matter of convenience only, and it would seem to be mani-

fest that jurisdiction cannot be conferred through the taking of a joint appeal, where otherwise there would not be the necessary jurisdictional amount.

On the question of whether the proper method for the purpose of obtaining a review is by petition to revise, or an appeal, the Circuit Courts of Appeal are, apparently, hopelessly divided. Thus, in *Re Pierson*, 233 Fed. (2nd Circuit), 519, it was held in 1916 that the proper remedy was by petition to revise, while the same Court in *Re B. Solomon & Co.*, 268 Fed. 108, in 1920 held that the proper remedy was by appeal. The Supreme Court of the United States, if we construe the decisions properly, holds that the remedy is by appeal.

In the Matter of Loving, 224 U. S. 183 (56 L. Ed. 725);

Coder vs. Arts, 213 U. S. 223 (53 L. Ed. 772);

Hewit vs. Berlin Machine Works, 194 U. S. 296 (48 L. Ed. 986)

BRIEF OF ARGUMENT.

1. Claimants have no superior equity to the fund in controversy, over the other customers of the Bankrupt who owned the remainder of the securities with E. F. Hutton & Company, aggregating in value \$46,741.28.

2. There is no distinction between the equities of a marginal and cash dealer.

In re J. C. Wilson & Co., 252 Fed. 631 (649, 650, 651-654);

In re Mason, 282 Fed. (9th Cir.), 202.

3. In cases of this kind, the first essential always is that the claimant shall be able to trace his securities, or the proceeds.

Schuyler vs. Littlefield, 232 U. S. 707 (58 L. Ed. 807);

In re Brown, 193 Fed. (2nd Cir.) 24;

In re J. C. Wilson & Co., 252 Fed. 631 (652);

In re Mason, 282 Fed. (9th Cir.) 202.

4. Claimants could not obtain relief, on the theory of unjust enrichment, since practically all of the creditors of the Bankrupt are in the same position. However, the doctrine of unjust enrichment is not recognized in this circuit.

Spokane County vs. First Nat. Bank, 68 Fed. 979;

Columbia Digger Co. vs. Rector, 215 Fed. 618 (630);

Titlow vs. McCormick, 236 Fed. 209 (214);

U. S. Nat. Bank of Centralia vs. City of Centralia, 240 Fed. 93 (95);

In re Morris Bros. 282 Fed. 670;

In re J. C. Wilson & Co., 252 Fed. 631 (640-642).

5. The only possible theory, for affording any of the claimants, other than Theis and Lane, any relief in this proceeding, is the rule of co-suretyship or joint

adventurers. In re Toole, 274 Fed. (2nd Cir.) 337.

6. Claimants must prevail, if at all, on the strength of their title, and not on the weakness of the title of the Trustee. However, where any customer of the Bankrupt elected to claim as a general creditor for his securities converted, instead of reclaiming the securities, or their proceeds, the title to such securities would become vested in the Trustee for the benefit of the general creditors to be distributed in the way of dividends. Claimants' share can not be increased due to any failure of the other customers to make claim.

In re Pierson, 233 Fed. (2nd Cir.) 519;

In re Pierson, 238 Fed. (2nd Cir.) 142;

In re J. C. Wilson & Co., 252 Fed. 631 (639 and 653);

In re Archer, Harvey & Co., 289 Fed. 269.

7. The 1910 amendment to Section 47 of the Bankruptcy Act specifically provides for cases of this kind and the Trustee does not now stand in the shoes of the Bankrupt.

Pacific State Bank vs. Coats, 205 Fed. (9th Cir.) 618.

ARGUMENT.

Briefly stated the situation is this: None of the securities or the proceeds realized therefrom, in which any of the claimants were interested, survived on November 7, 1921, with the possible exception of the pro-

ceeds of certain securities in which claimants Theis and Lane, were interested, unless for the purpose of determining such survival the condition as it existed August 3, 1921, the date when the receiver was appointed, be accepted. Prior to the filing of the petition in bankruptcy, all of these securities, with the exception of the ones in which Theis and Lane were interested, had been rightfully sold by the pledgee, E. F. Hutton & Company, and the proceeds rightfully applied toward the satisfaction of the indebtedness due Hutton & Company, for which said securities stood pledged. If, however, for the purpose of working out some equity in favor of the claimants, other than Theis and Lane, the condition which existed more than three months prior to the filing of the petition in bankruptcy be accepted, we find the following condition: At that time the bankrupt owed its customers, including claimants, \$211,098.27, under conditions which created equities in favor of such customers equal to that of claimants, with the exception that as to part of such amount of \$211,098.27 no securities of a similar nature to those in which some of the customers were interested still remained with Hutton & Company. However, to the extent of \$46,741.28 (the value of the securities with Hutton & Company, less securities to the amount of \$1,414 in which the customers were not interested), the customers whose rights arise through the conversion of such securities have in every respect as high an equity as claimants. Assuming that claimants have traced their securities as of date August 3, 1921, then the securities of these other customers have like-

wise been traced, and such securities were owned by such other customers. It follows that at the time the receiver was appointed by the State Court they were customers of the Bankrupt, for whom the Bankrupt should hold, and did hold, securities of the value of \$46,741.28, and which securities were in the hands of Hutton & Company properly held as collateral for the indebtedness due from the Bankrupt of \$37,690.00. Hutton & Company had the absolute right to hold and sell these securities, so far as necessary for the satisfaction of its debt. When that debt was satisfied there remained securities, or the proceeds, amounting only to \$10,465.27. The contention, therefore, of claimants is, that they should receive this fund which remained, to the exclusion of the other customers of the Bankrupt, who owned the remainder of said securities of the value of \$46,741.28 held by Hutton & Company. That, due to the fact that such other customers have not made claim for a return of their securities, or the proceeds, appellants should be permitted to take the entire fund. The proposition can not be sustained on any legal principal, and to allow such claim would be most inequitable.

When it came to the knowledge of any of the customers of the Bankrupt that a delivery of their securities could not be made by the Bankrupt they had the right to one of two remedies: (1) to follow the proceeds realized from the securities: (2) to have judgment against the Bankrupt for the value of the securities converted. If they followed and reclaimed the

proceeds realized for their securities the account was balanced. If they chose to hold the Bankrupt for the conversion of their securities, the Bankrupt became their debtor to the extent of the value of such securities, and the securities or their proceeds became the property of the Bankrupt. Adopting the last course would constitute the Bankrupt as an involuntary purchaser of the securities. Since Irving Whitehouse Company is now Bankrupt, the customer who did not seek to reclaim his securities, or their proceeds, but who claims as a general creditor, has no longer a right to reclaim his securities, or the proceeds, but must take as a general creditor through the distribution of the assets of the Bankrupt. Such customer is vitally interested in this controversy since if claimants should prevail, they have not only lost their right to reclaim their securities, or their proceeds, but the very securities, or their proceeds, which they surrendered for the purpose of augmenting the estate of the Bankrupt, expecting to share in such securities, or their proceeds, as a general creditor, will have been taken for the purpose of bestowing same on claimants who at no time had any interest in such securities, or their proceeds. Stated in another way claimants contention, in effect, is that had all these other customers made claim to the securities, in which they were interested, or the proceeds, appellants would only have been entitled to have received the amount realized from the securities in which they were interested, after deducting the pro rata part of the indebtedness to Hutton & Company, properly chargeable against their securities. Neverthe-

less since certain customers did not make claim for their securities, or the proceeds, claimants are entitled to receive that part which otherwise would have gone to such other customers.

The language of Judge Rose in *re Archer, Harvey & Company*, 289 Fed. (D. C.) 267 and which case is squarely in point on the merits of this case, is peculiarly appropriate.

"The practical importance of having a fixed and uniform rule in these cases is great. There is more frequent occasion to apply it in New York than anywhere else. There is therefore more than the ordinary reason why a District Court should accept the view taken by the Circuit Court of Appeals of another circuit. Besides, much can be said for the essential fairness of the practice there prevailing. Under it, each claimant gets all to which he is entitled. That something which might otherwise be taken for the exclusive use of a rival claimant actually goes to all the creditors is really to the advantage of the petitioner, in that it increases the fund upon which he will be entitled to go for a dividend for so much of his claim as is unsecured. It is true that he has the right before his securities can be called upon to contribute to the debt for which they were pledged, to require the application to that pledge of everything which belonged to the Bankrupt and which was pledged with the claimants. But, is there not more of theory than substance in the assumption that the unclaimed property must be treated as if it had been the Bankrupts' at bankruptcy merely because another customer in like class with petitioner does not, after bankruptcy, claim what such other was entitled to? There would seem to be nothing to recommend it, except a certain formal logic which it has or seems to have. Moreover, is there any

reason why the courts should put a premium upon filing preferential claims? When made, they must be respected; but, as a rule, are not the superior rights so asserted almost always the result of accident or chance? In the long run, would not as high a degree of equity be worked out, if all the customers of the bankrupt brokers shared equally in their assets, and that, too, with infinitely less trouble, delay, and expense."

Claimants apparently contend that they have some superior equity, due to the fact that: (1) some of them had paid in full for their securities at the time the receiver was appointed; (2) some on the theory that sufficient of their securities had been converted so as to turn their debit balance into a credit balance; (3) some on the theory that they had requested the Bankrupt to procure and deliver their securities at once. In this, as shown by the stipulated facts, part of which is quoted above, they were not dissimilar to the other customers, except that claimants have made claim for the proceeds of their claimed securities, while the other customers have not.

Nor in fact is there any distinction between the rights of a marginal dealer and a cash dealer in cases of this kind. Both classes are the owners of the securities and entitled to reclaim same. The fact that the marginal dealer owes something on his purchase affects the situation only to the extent, that he is required to pay the balance of the purchase price before he receives his securities.

In re J. C. Wilson & Co., 252 Fed. 631, on page 640

there is discussed the claim of one Rosenthal, who bought his stock and paid for it in cash. The broker failed to deliver, but deposited the stock with its correspondent broker, Harris, Winthrop & Co., as security for and in liquidation of the indebtedness due from the Bankrupt to its correspondent. The contest was over the securities that were in the hands of Harris, Winthrop & Co. at the time the petition in bankruptcy was filed; Rosenthal's securities were sold by Harris, Winthrop & Co., and the proceeds were applied toward the reduction of the indebtedness of the Bankrupt to it. Rosenthal contended that under these facts he was a class "A" claimant and entitled to a preference in the securities and funds remaining with Harris, Winthrop & Co. This contention was rejected and it was held that Rosenthal was but a general creditor. The court says:

"The principle has been tersely stated in *Multnomah County vs. Oregon Nat. Bank* (C. C.) 61 Fed. 912, as follows: 'It is settled that a person may follow and reclaim his property, wrongfully appropriated by another, so long as he can find it. If its form has been changed, he may follow the substantial equivalent of his property, in whatever form. The property into which his own has been changed is impressed with a trust in his favor. But the great weight of authority is against any extension of the rule beyond this.'"

Under the contention of appellant here, Rosenthal should have been entitled to have the value of his securities returned to him out of the fund realized from the sale of the other securities, because other property

should have been used, according to his claim, for the purpose of paying the indebtedness from Wilson & Company to Harris, Winthrop & Co., before resorting to the securities of Rosenthal.

Proceeding further in the J. C. Wilson & Co. case, and in dealing with the Goodwin claim, the court more pointedly discusses the differences, if any, between a marginal dealer and a cash dealer. Thus at page 649 it is said:

"Once the basic propositions of the Bamford Case are accepted, it would be entirely illogical to hold that, in order to place a claimant in class A, the conversion of stock must per se amount to sufficient to wipe out the debit balance, without regard to the state of whole account between the customer and the broker. Such a distinction, however, has been made by the master between, for instance, the Goodwin claim and the Patterson claim in the case at bar. In the Patterson claim the conversion was sufficient per se to wipe out the debit balance, and the master therefore placed Patterson's claim in Class A. But such cannot be the true test, either on principle or from the standpoint of fair and equitable consideration, based on the practical conduct of business of this kind. *The true inquiry should be to ascertain whether, after and as a result of the conversion, the customer would have a credit balance in his favor on the whole account, or a debit balance.* If he would have a credit balance, he could take courses (2) or (3) above mentioned; i. e., either to recover his securities by paying his debit balance or to obtain the net proceeds by ordering the securities sold. *If, on the other hand, as the result of the conversion, there would nevertheless be a net debit balance against the customer; then, if the securities*

were sold, he would still remain the debtor of the broker, or, if he paid his debit balance, he would nevertheless be out of pocket when the broker delivered the securities to him.

Lastly, in this connection, it is urged that margin customers are on a different basis from those who have paid for their securities outright. There is no logical ground for this distinction. The margin customer is the owner of the securities which the broker is carrying for him, and they become his absolutely the moment he pays any amount outstanding against him. The broker, it is true, may not hypothecate the securities of the outright owner, and may hypothecate those of the margin customer; but he has no right to convert to his own use the securities of the margin customer, and when he does so the results follow which are pointed out in *Ex parte Bamford*. *This rule applies where there is a conversion of any of the securities originally rightfully hypothecated.*" (Italics ours.)

At page 650 the court says:

"Second: Where securities are hypothecated without authority, *or though hypothecated with authority, are in part subsequently converted, the securities remaining stand on equal equities*, provided that, as the result of the conversion of securities originally rightfully hypothecated, the restatement of the whole account shows a credit balance in favor of the customer." (Italics ours.)

At pages 651 to 654 the same question is again dealt with, and the added contention that appellant's securities should have been sold last. The court says:

" * * * The master found that English had traced his 100 shares of stock, and awarded to him a lien in class A for \$1,561.90. This conclusion of the master was based upon the theory that Eng-

lish had a claim superior to those of the margin traders. In other words, as Wilson owed only 900 shares of this stock to cash customers, and had on hand with Harris 1,940 shares, the master has awarded in full to the cash customers, and it would follow from this holding that margin customers who had traced, under *Gorman vs. Littlefield* and *Duel vs. Hollins*, would receive only their pro rata of the remaining shares * * *.

“This view of the master follows a rather ingenious argument, which carries the theory of presumptive restoration to its ultimate limit. The theory now pressed is that it must be presumed that when the stock broker, for his own purposes, was converting Ray Consolidated, he converted those shares belonging to margin customers, because he owed the cash customers the highest duty not to deal wrongfully with their securities. The difficulty with this theory, as I see it, is that it confuses tracing with priority. Preliminarily, it may be stated that, where a claimant has traced by certificate number, or, under *Gorman vs. Littlefield*, where there is no other claimant for the same kind of stock, such claimant so tracing is entitled to all of that stock represented either by the identical certificate number or by the same kind of stock ‘in the box’ of the bankrupt, as the case may be. Whether such a claimant shall be then placed in class A or B depends upon the character of the equity of that claimant as developed by the facts * * *.

“At this point it is urged that it must be presumed that he selected the stock of the margin customer for the purpose of converting it, leaving untouched the stock of the cash customer. The difficulty with this theory is that the stockbroker had no more right to convert the stock of a margin customer than he had to convert the stock of a cash customer; * * *. The conclusion of the special master in this regard can be sustained only

by invoking the purest kind of legal fiction * * *. Without discussing in detail the principles laid down in the Gorman and Duel cases, *supra*, the ultimate result is that the claimant must find physically in existence either the precise certificate or a stock in kind, or the earmarked proceeds where there is liquidation, as in the case at bar, and, if there are not enough shares to satisfy the particular group of claimants, then such claimants are entitled to their pro rata * * *.

"Where claimants have failed to prove their claim to a pro rata of Ray Consolidated, such failure cannot enlarge the pro rata of those who have traced." (Italics ours.)

This court has cited with approval in *re J. C. Wilson*, *supra*, in its decision in *re Mason*, 282 Fed. 202, where it is said:

"In the present case the marginal traders do not appear to have paid for their shares; all stocks were sold to pay the indebtedness to the pledgee, and the marginal stocks more than paid the amounts of such debt. Marginal traders, who may have desired to save themselves any loss, could have paid up the amount due on their purchases and demanded their stock, and thus put themselves in a preferred class, on an equality with those who paid for the stock in full before bankruptcy. Such a position is discussed in *re Wilson* (D. C.) 252 Fed. 635, and was involved in *Hollins' Case*, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143, and generally the rule of decision is that, where stock certificates have been delivered to a broker as security for trades, but without authority to pledge, and where there is no trade pending and the stock has been pledged by the broker, if the loan has been liquidated, and it has not been necessary to sell the stock in order to satisfy the debt for which it was pledged, the customer may

recover. See also in re McIntyre, 181 Fed. 955, 958, 104 C. C. A. 419; In re Graff (D. C.) 117 343."

In cases of this kind the first essential always is that the claimant shall be able to trace his securities, or the proceeds. If he is not able to do this then no relief can be granted and he can claim only as a general creditor, notwithstanding his wrongs may be great. Thus in *Schuyler vs. Littlefield*, 232 U. S. 707 (58 L. Ed. 807), it is said:

"Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock, their claim must fail. If their evidence left the matter of identification in doubt, the doubt must be resolved in favor of the trustee, who represents all of the creditors of Brown & Company, some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund."

In re Brown, 193 Fed. 24 (2nd Cir.), it is said:

"As we said in re McIntyre, *Grace's Appeal*, 185 Fed. 96, 108 C. C. A. 543: 'While the doctrine of following trust funds has been much extended in the modern decisions, there has never been a departure in the federal courts from the principle that there must be some identification of the property sought to be charged with the trust funds'."

In re J. C. Wilson & Co., *supra*, it is said:

"The logical procedure, it seems to me, is that the first requirement laid upon a claimant is to trace his stock, or its identifiable proceeds. If he fails in that regard, no matter how grievous the wrong, he becomes a general creditor."

The same principle is recognized in this circuit in *re Mason*, 282 Fed. 202, where it said:

“Under such circumstances the customer is entitled to the shares or their proceeds when returned to the trustee if the loan has been paid by proceeds of other securities pledged therefor.”

Here no money came into the hands of respondent as the result of the sale of any of the securities, to which claim is made, unless it was the securities of Theis and Lane. The most that can be claimed by the other appellants is that they traced their securities into the hands of Hutton & Company, as of date August 3, 1921, and that such securities were shortly thereafter sold under the direction of the State Court Receiver. The proceeds, however, from the securities claimed by claimants, other than Theis and Lane, were being applied for the purpose of liquidating the indebtedness to Hutton & Company. If there can be any pretention of a tracing of the securities by claimants other than Lane and Theis, the result must be that each and all of the customers of the Bankrupt who owned securities similar to those held at that time by Hutton & Company, and which the Bankrupt should have been holding for them, have to the same extent, as claimants traced and identified their securities, and claimants could in no event claim more than their proper share of the proceeds which remain after the liquidation of Hutton & Company's claim. Expressed differently, they could not in any event claim more than that given by the order of the District Court from

which the appeal is prosecuted, viz., an application of securities owned by the Bankrupt, and to which customers had no right, first toward the liquidation of Hutton & Company's claim. Each of the other securities to contribute pro rata toward the satisfaction of the remainder of Hutton & Company's claim. Each of the customers to be entitled to reclaim from the Trustees the amount which remained as the proceeds from the sale of the security in which he was interested. If there were more than one claimant to such security, such claimants should in turn pro rate such balance derived from such security. There is neither logic, nor equity, in a claim that the securities owned by these other customers should be taken, and the securities in which claimants were interested should be left intact. Hutton & Company had a right to demand payment of its indebtedness, and to sell the securities for that purpose. If claimants have any right to make any claim, it is only to such balance as may remain after their stock, together with the others, have contributed toward the payment of the indebtedness, for which it all stood pledged.

Some courts have gone to the extent of allowing a recovery on the theory of unjust enrichment. Such claim could not well be made here since claimants position was in no sense different from that of the other creditors of the Bankrupt, who held claims totaling \$211,098.27, all of which claims were the result of the wrongful acts of the Bankrupt in appropriating their property. However, the unjust enrichment theory is not recognized in this Circuit.

Spokane County vs. First Nat. Bank, 68 Fed. 979;

Columbia Digger Co. vs. Rector, 215 Fed. 618 (630);

Titlow vs. McCormick, 236 Fed. 209 (214);

U. S. Nat. Bank of Centralia vs. City of Centralia, 240 Fed. 93 (95);

In re Morris Bros., 282 Fed. 670.

For a very full discussion of this unjust enrichment question see in *re J. C. Wilson & Co.*, 252 Fed. 631 (640-642).

The only theory on which any of the claimants other than Lane and Theis can have any relief in this proceeding is the rule as announced in *re Toole*, 274 Fed. 337, of co-suretyship, or joint-adventurers. The purport of that decision is that all of the customers of the Bankrupt whose securities were in the pledge with Hutton & Company, were joint-adventurers and were co-sureties for the payment of the indebtedness to Hutton & Company, so far as their securities with Hutton & Company were necessary for that purpose; that as such co-sureties their securities should be applied pro rata toward the liquidation of the indebtedness to Hutton & Company for which they stood pledged. Thus it is said:

“The principle is that where all are equally liable for the payment of a debt, all are bound equally to contribute to that purpose, so that if the stock of A, B and C is lawfully pledged for the payment of the debt of X, the stock of each is under the com-

mon burden, and, if X sells the stock of A and B and leaves unsold the stock of C the latter must contribute to A and B the *excess they have paid above their share*. But if, on the other hand, the stock of A is lawfully pledged, while that of B and C is unlawfully pledged, there is no obligation on the part of B and C to contribute, for there is no common burden as between A on the one side, and B and C on the other." (Italics ours.)

Finally it is the theory of the claimants that their legal rights and equities are greater because certain of the customers of the Bankrupt, who were interested in certain of the securities held by Hutton & Company, on August 3, 1921, did not make a claim for their securities, or the proceeds. Such a claim, in addition to being most inequitable, can have no support in reason. While respondent, as Trustee, had no higher title to any of these securities than did the Bankrupt, yet anyone who asserts his claim to such securities as against the Trustee, must succeed, if at all, on the strength of his own title and not on the weakness of the title of the Trustee. Further, since the securities in which these other customers were interested were converted without their authority, the customer had one of two remedies. He might, if he so elected, follow the proceeds and reclaim such proceeds, if he was able to successfully trace. If he pursued this course he would have no claim against the Bankrupt for the conversion, since he would have fully satisfied his claim. Or if he so desired, he might claim as against the Bankrupt, for the value of his converted securities. If he adopted this course, he would become a general creditor and

entitled to have his claim satisfied out of any property available for that purpose. Pursuing this course, however, would be a relinquishment to the Bankrupt, or its Trustees, of the proceeds realized from the securities so converted. In other words the Bankrupt would become an involuntary purchaser, the customer being entitled to his demand for the value of the securities, and the title to the securities, or their proceeds vesting in the Bankrupt. In such a case the Bankrupt, or its Trustees, would acquire title through the customer, and not as the result of any ownership as of the date of conversion. Thus, if it should be argued in this case, that since these other customers elected not to claim a return of their securities, or the proceeds such proceeds should be theoretically used to pay Hutton & Company's debt before any application should be made of the securities of any of the claimants for that purpose, there are several quite apparent answers to such contention. In the first place, the title of the Trustee to such securities of the other customers did not exist as of the date the sale was made by Hutton & Company, but has been acquired since, as the result of the election of the customer to claim as a general creditor. Further, to permit such a contention would enable claimants to recover, not on the strength of their own title, or their equities, but on the chance that some other customer similarly situated would forego his right and surrender his title. The legal and equitable right of claimants would not, therefore, be fixed by any certain standard, but would be determined according

to accident or chance. That claimants can not claim except to the extent as shown by the order appealed from, and that their rights can not be enlarged, due to the fact that some other customer of the Bankrupt has failed to make a claim for his securities, or the proceeds realized therefrom, is supported by the only Federal decisions which have passed upon such a question. As to the securities, or their proceeds, which are not reclaimed, they become a part of the general estate for distribution among general creditors.

In *re* Pierson, 233 Fed. 519 (2nd Cir.), the Court says:

"The fact that some of the long customers make no specific claim for stock in the surplus can not enlarge the rights of one who does."

In the same case, on rehearing, 238 Fed., 142 it is said:

"The decision of the Supreme Court in *Duel vs. Hollins*, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143, requires us to modify our opinion lately handed down, so as to direct that the court below permit the claimants Van Thyn, Vrieslander, Levy and Quinn to recover their pro rata shares of the respective stocks on hand, *but their shares must be ascertained by including in the calculation the shares of all long customers in the same position, whether they made claim for their shares in the stock on hand or not. That the shares of those who claim should be increased by the circumstance that other long customers made no claim would be inequitable. What would otherwise have gone to those customers should*

go to the general creditors.” (Italics ours.)

See also:

In re J. C. Wilson & Co., 252 Fed. 631 (639 and 653).

In re Archer, Harvey & Company, 289 Fed. (D. C.) 267, the question received very careful consideration by Judge Rose. The court says:

“In the case now at this bar, most, if not all, the petitioners owed the bankrupts greater or less sums, and the securities in which they are now trying to assert rights were delivered to the bankrupts or left with them to protect this indebtedness. It does not appear that any of the petitioners gave the bankrupts any express authority to rehypothecate their securities, and any implied power to do so, was, of course, limited to the amount of the bankrupt’s advances to them. Any pledging beyond that amount was wrongful, as was any hypothecation at all of the securities owned of the persons who were not indebted to the bankrupts. Under the circumstances of this case, it seems at once just and practically expedient to treat the petitioners whose securities were pledged for a greater amount than that for which the bankrupts had any right to burden them as being as to such excess, but as to that only, in the same class with those whose securities had been hypothecated, although they owed the bankrupts nothing. *In re Wilson & Co.*, Goodman’s Claim (D. C.) 252 Fed. 631; *in re Bolling*, 147 Fed. 786, affirmed in *Kean vs. Dickinson*, 152 Fed. 1022, 82 C. C. A. 667.

“When the crash came, the bankrupts were short of various kinds of securities; that is to say, the sum of such securities in their box, plus

those pledged by them, was usually less than the total which their books showed belonged to their customers. For example, according to the bankrupts' book, A., B., C., and D. may have been each entitled to 100 shares of X stock. The bankrupts, had none of such in their box, but they did have 200 shares pledged on a loan to the K Bank. A. and B. have each filed petitions alleging themselves to be the owners of 100 shares of that stock, and claiming it. C. and D. have done nothing other than to put in claims as general creditors, without setting up any title to any specific shares, although the time limited by order of the court or so doing has long since expired. The Trustee contends that A. and B. are entitled to but one-quarter each of the stock which in any sense survived Bankruptcy; that is to say, 50 shares each, of rather to any surviving equity there may be therein after the payment of the sums due the pledgee. A. and B. answer that if, for the purpose of this case, it be assumed that they each could claim but 50 shares held by the pledgee, they are at all events clearly entitled to have any shares belonging to the bankrupts, or which, although not owned by the bankrupts, were rightfully pledged by the latter and in the hands of the pledgee, first applied to the payment of the debt before their stock can be called upon for contribution. *In re Hollins & Co.*, 232 Fed. 124, 146 C. C. A. 316. If no one other than the bankrupts claim the 100 shares, which possibly or probably might have been claimed by C. and D., either those shares remain the Bankrupt's property or were rightfully pledged by them, and must be first applied to the extinguishment of the bankrupt's debt to the pledgee. As the accounts actually work out in this case, petitioners, who are in the situation of A. and B., are content to be dealt with upon the theory last stated without raising the question whether they are or are not entitled to assert that, there being 200 shares un-

claimed by others than themselves, and that being precisely the amount due them, they are entitled each to his 100 shares, or rather to the equity therein."

Proceeding further and after referring to *in re Pearson*, *Supra.*, and in *re J. C. Wilson & Co.*, *Supra.*, the court says:

"The practical importance of having a fixed and uniform rule in these cases is great. There is more frequent occasion to apply it in New York than anywhere else. There is, therefore, more than the ordinary reason why a District Court should accept the view taken by the Circuit Court of Appeals of another Circuit. Besides, much can be said for the essential fairness of the practice there prevailing." (In *New York*, as the rule is announced in *re Pearson* and in *re J. C. Wilson & Co.*) "Under it, each claimant gets all to which he is entitled. That something which might otherwise be taken for the exclusive use of a rival claimant actually goes to all the creditors is really to the advantage of the petitioner, in that it increases the fund upon which he will be entitled to go for a dividend for so much of his claim as is unsecured. It is true that he has the right, before his securities can be called upon to contribute to the debt for which they were pledged, to require the application to that pledge of everything which belonged to the bankrupt and which was pledged with the claimants. But is there not more of theory than substance in the assumption that the unclaimed property must be treated as if it had been the Bankrupt's at bankruptcy merely because another customer in like class with petitioner does not, after bankruptcy, claim what such other was entitled to? There would seem to be nothing to be entitled to? There would seem to be nothing

to recommend it, except a certain formal logic, which it has or seems to have. Moreover, is there any reason why the courts should put a premium upon filing preferential claims? When made, they must be respected; but, as a rule, are not the superior rights so asserted almost always the result of accident or chance? In the long run, would not as high a degree of equity be worked out, if all the customers of the bankrupt brokers shared equally in their assets, and that, too, with infinitely less of trouble, delay, and expense.

In stating the accounts in this case, each of the petitioners who has a claim for a portion of any security or for the surplus remaining after the payment of the debt for which it is common, with others has been pledged, must be treated as the owner of that proportion; but he is not to benefit by the fact that other persons, having equal rights with him to share in that security, have made no claim therefor. The proposition of the security or the equity therein to which such others are entitled, are to go to the bankruptcy trustee for the benefit of the general creditors, not because at bankruptcy they were the property of the bankrupt, but because, after the bankruptcy, those to whom they belonged preferred to allow them to become a part of the property to be equally distributed among all the creditors." (*Italics ours.*)

The order made by the District Court, from which this appeal is prosecuted, is squarely in harmony with *in re Archer, Harvey and Co., Supra*. In every respect such order so made is consistent with that decision, likewise it is entirely consistent with *in re Toole*, *in re Pearson*, *in re Toole* and *in re J. C. Wilson & Co.* The adoption of any other rule could not be sus-

tained on any legal ground and would be most inequitable.

CLAIMANT'S BRIEF

Some reliance is placed by claimants, due to the fact, as they claim, that on January 23, 1923, an order was made by the Referee directing all having claims to the Hutton & Company fund, to appear and assert their claim. (Claimant's Brief 6.) Respondent disputes that there was any proceeding taken before the Referee, which would in any respect enlarge claimant's right, or restrict respondent's right, or that any such attempt was made. Further at all hearings, involving the fund in controversy, the general creditors through the Trustee in Bankruptcy was before the referee asserting their right to this fund. No matter what proceedings may have been taken before the Referee, it is manifest that they could not be of a nature that would transfer to the claimants here property belonging to other customers of the Bankrupt. Claimants were not asserting ownership in the fund remaining with Hutton & Company, but were asserting ownership only to certain specific securities which they claimed were, on August 3, 1921, held by Hutton & Company. Any notice given, such as suggested by claimants, could only have the effect of adjudicating the right as to such specific securities in which claimants were interested, and any proceeds realized therefrom. It would scarcely be claimed that it would have the effect of adjudicating title in claimant's to cer-

tain securities, or their proceeds, to which they had never, in fact, made claim.

At page 10 and at other places in their brief, claimants urge that their securities were wrongfully pledged with Hutton & Company. If this is true, then it is likewise true as to the other customers of the Bankrupt, whose securities were with Hutton & Company on August 3, 1921. However, claimant's statement is not accurate. The securities were rightfully in pledge. The Bankrupt, was guilty of a breach of contract, in that it was its duty upon payment being made for the securities in pledge, or upon the Bankrupt converting other securities of the customer, sufficient to turn the debit balance of such customer into a credit balance, to withdraw the securities of such customer from the pledge. All of the customers of the Bankrupt, whose securities were in the hands of Hutton & Company, were similarly situated. A similar breach of contract as to each of them existed, since any debit balance due from them to the Bankrupt had been changed into a credit balance, either by payment, or by conversion of other securities. As to none of the claimants, however, was there a wrongful pledge. At most there was a commission of a wrong through the conversion of other securities, and a failure to perform its contract and in not withdrawing the securities rightfully pledged from Hutton & Company.

The decision in *Skill vs. Stoddard*, 63 Conn. 216, and in *re Mills*, 110 N. Y. Supp. 314, have to do with

a wrongful appropriation of securities, under circumstances which amounted to a larceny. Thus in *re Mills* the securities were left with the broker for safe-keeping. She had no trade pending, and owed the brokers no money, and they never had any authority either express or implied to use her securities. The Court says: "She owed them nothing, and they had no more right to pledge her stock as security for the loan, than they would have had to have taken money out of her pocket against her will. It was larceny of the stock and nothing else." In *re Mills* follows the decision of the same court in *Tompkins vs. Morton Trust Company*, 86 N. Y. Supp., 520, which last mentioned case is referred to by the second circuit in the decision in *re McIntyre*, 181 Fed. 955, where in considering Pippey's appeal, the court held that Pippey had a right to reclaim his stock, which had been traced and was still in existence, and in the hands of the trustee, without being required to contribute in favor of others whose securities had been sold to satisfy the pledge. The theory of the decision in *re McIntyre* was that when the broker pledged Pippey's stock he was committing a larceny, and this feature is very carefully examined and considered in *re J. C. Wilson & Co.*, 252 Fed. 631, and the decision very carefully interpreted as to the Pippey doctrine at pages 636-640, where it is pointed out that the whole question turned upon whether the securities had been *originally* pledged by the broker rightfully, or under circumstances which amounted in effect to larceny. If originally pledged rightfully, he could not demand a

surrender of his securities which survived, without contributing in favor of those whose securities did not survive, and whose securities were used to pay the indebtedness for which all stood as collateral "the excess they have paid above their share," but if the securities were pledged under conditions which, in effect, amounted to larceny, he could not be required to contribute since there was no co-suretyship or co-adventure, as discussed in *re Toole*, 274, Fed. 337.

Claimants have discussed and quoted from in *re Ennis* at pages 13 to 17 of their Brief. In *re Ennis* and all other Federal decisions, dealing with the question there discussed turned upon the question as to whether there was a pledge by the Bankrupt under conditions which amounted to a larceny. Thus it is said:

"When a broker pledges as collateral to a loan at a bank, securities left with him for safe keeping or for sale, he is a wrongdoer from the outset, and, while the bank may have the right to hold the securities, the claim of the owner upon the satisfaction of the Bank's demand is of the highest equity."

The quotation above from in *re Ennis* is entirely in harmony with in *re McIntyre*, in *re J. C. Wilson and Co.*, and deals with a condition that is not involved in the slightest in this case. The securities of claimants were rightfully pledged. At most there was a wrongful action in permitting them to remain in the pledge, if the indebtedness due the Bankrupt had been paid. There was no question of a larceny of the se-

curities, which as stated in *re Ennis*, in *re McIntyre* and in *re J. C. Wilson & Co.* and also in *re Mills* represent the highest character of equity.

Claimants again at pages 20 and 21 of their brief refer to the alleged order made by the Referee attempting to bar other customers interested in the fund. We are in doubt as to just what claimant's contention is. Surely they can not contend that any such order vested the ownership that existed in other customers in themselves. However that may be, the order which was made by the Referee, is the one which was reversed by the District Court, and in that proceeding the general creditors were before the Referee through the Trustee in Bankruptcy protesting against the dissipation of the fund, which was in the 'Trustees' hands, and asserting ownership thereto as against claimants. In this situation, the language used by the court in *re J. C. Wilson & Co.*, 252 Fed. 631 (639) is pertinent, in referring to in *re McIntyre*:

"As, however, those similarly situated with Pippey did not appeal, the Circuit Court of Appeals had no grievance before it on the part of those claimants. The case was not like *Matter of Pierson*, 232 Fed. 519, 147 C. C. A. 405 and 238 Fed. 142, 151, C. C. A. 218, *where the general creditors via the trustee were before the court*, and the court held that the mere fact that certain customers (like Cochran) had not made a claim, could not serve to increase the shares of those who did claim. (*Under Duel vs. Hollins*, 241 U. S., 523, 36 Sup. Ct. 615, 60 L. Ed. 1143), and to decrease the fund available for general creditors." (Italics ours.)

Claimants, in their brief (p. 31), say:

“This being true must we be forced to deliver to the trustee, who, as far as these proceedings is concerned, stands garbed as the wrongdoer, Whitehouse, the lion’s share of our property,
* * *”

This is a rather remarkable statement. It has been respondent’s understanding that he owed a duty to the general creditors to protect the estate, so far as possible, and not to permit claims such as these to be asserted, where there was not the proper legal or equitable foundation therefor. It does not seem to respondent that he is a wrongdoer in opposing, practically all of the estate being diverted to claimants whose equities are not superior to that of practically all other creditors of the Bankrupt. It has seemed to respondent that, these other customers of the Bankrupt, whose securities were held by Hutton & Company, should be entitled to some consideration, and they can receive no consideration except as general creditors. It has not seemed to the respondent that any equitable principle would permit the taking of such other customers’ property, and bestowing it upon claimants, and especially when such a course would result in depriving them of the dividends, which they are rightfully entitled to claim as general creditors.

That claimants’ contention, as to the position occupied by the Trustee, is unsound, appears clearly from the 1910 amendment to the Bankruptcy Act. This amendment to Section 47 is as follows:

"Such Trustees, as to all property in the custody, or coming into the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceeding thereon;
* * *."

This court, in construing said Section 47, in *Pacific State Bank vs. Coats*, 205 Fed. 618, has said:

"The Trustee no longer stands in the shoes merely of the Bankrupt * * *."

We submit that the order of the District Court, from which the appeal is prosecuted, is as favorable to claimants, as the law, and the principles of equity, will permit, and that the judgment of the District Court should in all respects be affirmed.

Respectfully submitted,

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JAMES A. WILLIAMS,
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Attorneys for Respondent.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

*In the Matter of IRVING WHITEHOUSE COMPANY,
a Corporation, Bankrupt*

L. C. REAM, HAZEL MOWERS, MABEL
CONNOR, H. E. WOODLAND, MAUDE
MOWERS, OSCAR LANTOR, CHARLES
THEIS, ALEXANDER STEPHENS, O. W.
WITTMER, T. S. LANE, DAVID ACKER-
MAN, STANLEY HODGMAN, AUGUSTA
W. HOWELL, *Petitioners,*

No. 4075

vs.

W. S. McCREA, as Trustee in Bankruptcy of Irving
Whitehouse Company, a Corporation, Bankrupt,
Respondent.

*Appeal and Petition to Revise from the District
Court, Eastern District of Washington*

Appellants' and Petitioners' Reply Brief

GRAVES, KIZER & GRAVES,
WAKEFIELD & WITHERSPOON,
ALLEN, WINSTON & ALLEN,
FABIAN B. DODDS,
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SAMUEL EDELSTEIN,
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Spokane, Washington,
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The principal points raised by the trustee in his brief may be conveniently grouped under four heads. It is first contended that the claimants have no superior equities in the fund in controversy over the other customers of the bankrupt. It is next urged that there is no distinction to be drawn between the equities of cash and margin dealers. The third contention is that if any customer of Whitehouse who was entitled to securities pledged with Hutton failed to claim his property, his rights therein vested in the trustee, who may now assert them as against these petitioners. Lastly it is argued that the claimants, save Lane and Theis, have failed to trace the proceeds of their securities into the fund in question because, as appears from the list on pp. 3, 4, 5 and 6 of the trustee's brief, the securities of all other claimants were sold prior to a time when the proceeds of all sales equalled the debt due Hutton.

We disregard the argument that there can be no claim on the unjust enrichment theory since we have never advanced it, believing it to have no bearing on the present controversy. We are likewise disregarding the fifth subdivision of the trustee's Brief of Argument which turns on the case of *In re Toole*, 274 Fed., 337, since we do not desire to add to our discussion of this case in our opening brief.

We will take up these contentions of the trustee in the same order that we have set them out, first turning our attention to the question of whether the equities of these claimants are higher than those of

the other customers of Whitehouse whose securities were included in the Hutton pledge, since it is our opinion that the determination of this question solves all problems arising in this controversy.

I.

These petitioners are possessed of equities higher than those of the other customers of Whitehouse whose securities were included in the Hutton pledge.

It is our contention that those who authorized Whitehouse to pledge their securities with Hutton have not the same equities as have those whose securities were pledged by him without their authority, since the first group voluntarily submitted their property to the perils through which it was lost to them. It is further our belief that the bankrupt had the right to pledge the securities of marginal customers but did not have such right over the securities of those who had paid in full.

An examination of pp. 74 to 87 of the Transcript, on which are set out the matters of importance in the individual claims, will disclose that all these petitioners, with the single exception of Wittmer, had paid in full for their securities before the failure on August 3, 1921. The majority had made voluntary payments in currency, and the balance had paid in full by Whitehouse's conversion of their securities. As a result, in no instance did he have the right on that date to hold their properties in pledge. In our opening brief we have already called to

the attention of the court the various cases which hold that after a customer has paid the full amount of his indebtedness the broker has no further right to retain his property in pledge, and it is unnecessary to refer to them again here, especially since the stipulation likewise covers this particular point. It is agreed on pp. 64 and 65 of the Transcript that "In all marginal dealings it was agreed between Irving Whitehouse Co. and the customer that the securities purchased as well as the collateral put up by the customer to secure his account with the bankrupt might be rightfully pledged. * * * It was understood that if the amount due on any account was paid in full, the bankrupt must at once deliver either the identical securities put up as collateral, or purchased, or others exactly similar thereto."

One J. C. Bird, an accountant of the bankrupt, testified on behalf of Stephens to the same effect. See pp. 88 and 89 of the Transcript. "Our practice was to carry as a marginal transaction any stock on which there was some balance due, no matter how small, and we considered we had the right to hold stock purchased in pledge until the full purchase price was paid, and this was the way we carried this transaction and is the general custom of stock-brokers."

The same witness, later, at pp. 99 and 100 of the Transcript, in testifying for the benefit of O. W. Wittmer, said: "It is the custom in all marginal transactions carried on between the broker and his

customer that the broker may rehypothecate any securities which he holds on the customer's account so long as this customer remains indebted to him."

It must follow from the foregoing that since none of these petitioners were indebted to Whitehouse he had no authority to pledge any of their securities. That being true, if all the other customers were possessed of equities equal to theirs it must be because they were not marginal traders but had likewise paid in full. The stipulation, however, shows a contrary state of facts to exist. It is said on p. 64 of the Transcript: "As a matter of fact almost all the collateral held by Hutton & Co. to secure the Irving Whitehouse Co. account was composed either of the securities bought by marginal traders or deposited by them as collateral." Again it is agreed on p. 72, after reference is made to the securities owned by Whitehouse, that, "the rest belonged to customers of Irving Whitehouse Co., by far the greater amount being property of marginal dealers."

These quotations would seem to settle that Whitehouse had authority to pledge the securities of marginal customers and that the majority of those persons whose securities were included in the Hutton pledge were marginal customers. If then it be true that these petitioners had paid in full for their securities and that their doing so had deprived Whitehouse of the right to pledge, it must follow that their equities are greater than those of the other customers.

It is not necessary and, of course, it is impossible for us to demonstrate conclusively that we are the only persons possessing such superior right, or, as is sometimes said, are the only "Class A" claimants. To establish this it would be necessary to investigate the account of each of the Whitehouse customers, together with all correspondence carried on between every customer and the broker. Apparently the expense of such an undertaking would be prohibitive. However, although we do not feel that it is incumbent upon us to make this attempt, we are, nevertheless, able to prove that in all probability we are the only persons entitled to be grouped in "Class A". It appears from the record that the failure took place over two years ago. The first petition filed by any of these claimants was recorded in February of 1922 so that these proceedings have been pending for over a year and a half. In September of 1922 the few petitioners who had then appeared obtained an order from the referee awarding them the value of their securities, and shortly thereafter the remainder of these claimants came before the court demanding their property. The court will take notice of the fact that all litigation arising from such a failure as this receives a large amount of publicity. It is also true that the great majority of creditors after receiving news of this award consulted attorneys to ascertain whether they might not recover on the same theory, and this assumption is borne out by the fact that about half of these petitioners came in directly after the date of that order.

Bearing in mind these facts and the further element that these proceedings have been of record for more than a year and a half in the bankruptcy files, where any creditor who investigated must have seen them, is it unreasonable to suppose that all, or at least nearly all, of the customers had actual knowledge of these proceedings and that a great majority made some investigation to determine whether they were entitled to be included in the favored "Class A"? This supposition, which, it must be confessed, is entirely reasonable, can be overthrown only by some presumption of fact established by well known rules of evidence. The only presumption, however, which seems applicable to the situation lends its aid to the support of our contention. It will always be presumed that an individual in his dealings with others has violated no duty which he owes them and this presumption of innocence will be indulged in until the contrary is shown. In order that there might be other "Class A" claimants it would be necessary to show either that Whitehouse had pledged securities other than those of these petitioners which had been paid for in full or that he had converted securities of his other customers in such quantities as to wipe out their debit balances.

Although the presumption of innocence may be weakened by showing other violations of trust, it is not overcome thereby, and the court will not act upon the theory that because Whitehouse misappropriated the property of one customer he misappro-

priated the property of all, but will rather consider that each breach of trust was the result of a pressing necessity for funds at some particular time and not that the bankrupt had made a practice of converting the securities of every person who trusted him. This presumption so applied will, moreover, work out justice here. If the trustee believes that in certain cases he is entitled to superior equities because persons who might have been grouped in "Class A" voluntarily waived such right and elected to claim as general creditors, he should be under the necessity of proving the facts on which such claim is based, and certainly we should not be under the necessity of proving that every one of several hundred creditors was not a member of a particularly fortunate group.

We have dealt thus at length with this question of relative equities since we believe that its determination clears up the other contentions of the trustee, with the exception of his argument that there has been a failure to trace.

II.

Cash customers and marginal customers whose securities, in part, have been converted possess equities higher than those of marginal dealers whose securities were not converted.

The trustee, to bolster his theory that these petitioners are not possessed of higher equities than those of other customers of Whitehouse, asserts that

in determining the equities of claimants there is no difference between cash customers and marginal dealers, and quotes portions of the Goodwin and English claims in the case of *In re J. C. Wilson*, 252 Fed., 631.

The Goodwin claim seemed to us clearly in our favor and was quoted at considerable length in our opening brief as sustaining the theory that if securities of a customer had been converted and a restatement of the account showed a credit balance in his favor he was entitled to be grouped in "Class A" along with those who had at the outset paid in full for their securities. In this respect it is true there is no distinction between cash customers and marginal customers whose securities have been converted, but the reason that there is no distinction is not that cash customers have been degraded to the general level of marginal dealers, but that certain marginal dealers through the conversion of their securities have been elevated to "Class A". A glance at the rules of classification according to equities laid down by the court at p. 650 and quoted in our brief at p. 19 shows this to be true.

The English claim is cited in our brief at p. 28 as explaining the doctrine of the Pierson case. In this claim it developed that the broker had in pledge at the time of the failure insufficient shares of a certain security, Ray Consolidated, to satisfy the demands of all long customers. Some of these customers had paid in full for the securities they had

ordered while others were marginal dealers. Under the doctrine of the *Pierson* case and *Duel v. Hollins*, it was held that each was entitled only to his respective proportion of the securities on hand irrespective of whether the others who were entitled to these securities claimed or not. The cash customers endeavored to increase their proportions by eliminating the claims of marginal customers, and to do this advanced the theory that it must be presumed that in converting the stock the broker sold first the securities of marginal customers. The court held that since the broker had no more right to *sell* the securities of marginal customers than he had to sell the securities of cash customers, the wrong done one group was as great as that done the other, and that consequently the presumption could not be indulged in. As was said in our opening brief, this case is an authority only on the question of identifying or tracing securities in the pledge and does not concern itself with the equities of those who have traced, since the determination of equities takes place only after the tracing is completed, as appears from our quotation from the case on p. 28 of our brief.

III.

If it be assumed that the trustee receives the rights of those customers whose securities were pledged with Hutton, but who did not claim restitution, this will not avail him, unless he has proved that such non-claiming customers had rights equal to these petitioners.

Much space in the trustee's brief is devoted to developing the theory that if any customer, whose securities were pledged with Hutton, failed to claim them or their proceeds, his rights descended to the trustee, who might, thereafter, assert them as against other customers who did claim redemption. He relies exclusively on the case of *In re Archer Harvey & Co.*, 289 Fed., 269. Without discussing whether or not this case lays down the correct doctrine, it is worthy to note that it deals exclusively with what we have termed "Class B" claimants, that is persons who had consented to a pledging of their securities, it being said on p. 269 that "In the case now at this bar, most, if not all, the petitioners owed the bankrupts greater or less sums and the securities in which they are now trying to assert rights were delivered to the bankrupts or left with them to protect their indebtedness."

Our answer to this contention of the trustee is the same that we have set up to meet his other arguments—these petitioners possess higher equities than the other customers of Whitehouse. While it might

well be urged, where only the demands of "Class B" claimants are involved, that the trustee is vested with the rights of those who do not seek restitution and may assert these rights as against customers who do but whose equities are no higher than the others, yet it must be apparent that this same contention cannot be successfully raised as against petitioners who stand possessed of higher equities than the customers through whom the trustee claims. Apparently the interest of the trustee cannot be greater than the interest of the customers who, it is said, have conferred their rights upon him by their election to come in as general creditors and if, therefore, such creditors could not successfully have contested the right of these petitioners to recover, they cannot confer upon the trustee rights or equities that will enable him to contest our claims, or if, as a matter of fact, certain of these non-claiming creditors were possessed of equities equal to ours, the trustee must prove that fact, if he seeks to recover on it, for the reasons suggested earlier in this brief.

IV.

The fact that the securities of certain petitioners were sold at a moment when the sum total of all preceding sales did not equal the amount due Hutton does not bar such petitioners from the right of asserting their interests in this fund.

The trustee has arranged a list of the pledged securities showing the times of the various sales. It is agreed that all securities were sold out together under a blanket order of the receiver, and the short interval that elapsed between each sale shows that the sale was, as a matter of fact, but one transaction. It, nevertheless, appears to be the trustee's contention that because the securities of certain petitioners were sold at a time when the proceeds derived from all prior sales did not equal the debt, that such securities did not survive and therefore may not be traced into the fund.

A case squarely in point is the claim of Rolph in *In re J. C. Wilson*, 252 Fed., 631. That case differed from the one now at bar in that the fund was insufficient to satisfy all "Class A" claimants. Rolph, as to certain of his securities, was entitled to be placed in that group, but asserted higher rights due to the fact that his securities had not been sold. It would be impossible to improve on the reasoning of the court. See p. 639, where it was said:

"If, however, it be held that, after a petition in bankruptcy has been filed, the pledgee, by

selecting for sale some stocks and not others, can thereby save some stocks intact for the owners without the burden of contribution, and not others, it can readily be seen that the door will be opened for the most indefensible kind of favoritism, and possibly for corrupt bargains between the owners of securities and the pledgee. Indeed, a pledgee of his own motion, without any agreement with owners of securities, could easily safeguard his friends to the detriment of others who were strangers to him. I am fully satisfied, therefore, that Rolph is in the same position as other class A claimants."

See also:

In re *Toole*, 274 Fed., 337.

In re *Mills*, 110 N. Y. S., 314.

In concluding we desire once more to put our theory of the case before the court. We contend that our equities are higher than those of the other customers of Whitehouse, and if the court finds against us on this phase of the case we are content to abide by the order of the District Court. But if they do find, as it seems to us they must, that our equities are superior to those of other customers, then it must follow that if such other customers were before the court we could satisfy our demands from this surplus fund before they might partake thereof, and if this would be true, it must likewise be true that the rights which the trustee claims to derive from them cannot be increased by the simple process of derivation, but must remain the same when vested in him as when vested in them and that consequently he can no more insist on an equal di-

vision with us than could his predecessors in interest.

Respectfully submitted,

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Spokane, Washington.

Solicitors for Appellants and Petitioners.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GUSTAVE JOHNSON,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
First Division.

FILED

United States
Circuit Court of Appeals
For the Ninth Circuit.

GUSTAVE JOHNSON,

Plaintiff in Error,

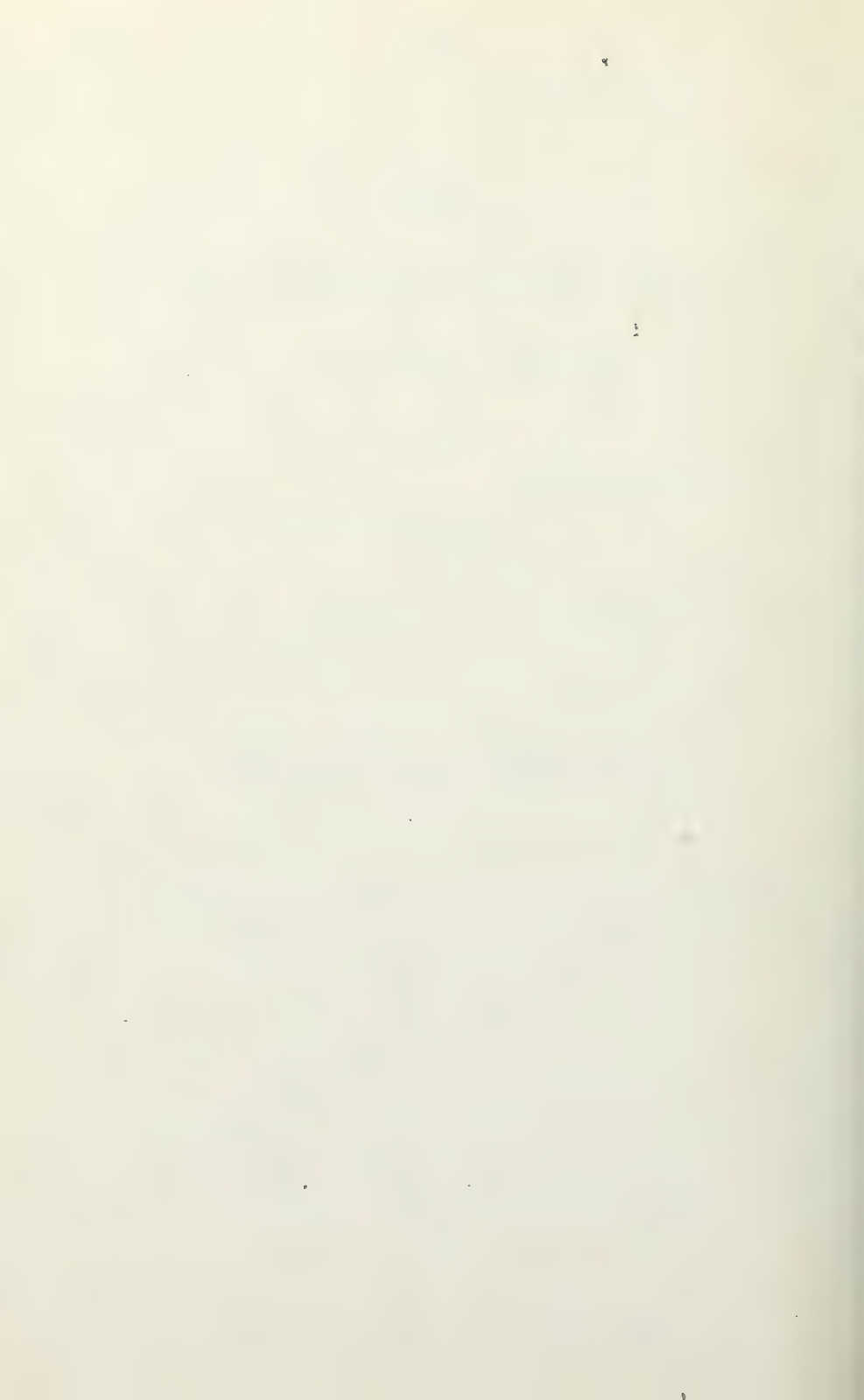
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First Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States, Northern District of California.

Clerk's Office.

No. 13,169.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUSTAVE JOHNSON,

Defendant.

Praeipie for Transcript on Writ of Error.

To the Clerk of Said Court:

Sir:

Please prepare the transcript of record upon writ of error in the above-entitled cause.

1. Indictment,
2. Arraignment and demurrer filed by defendant,
3. Order overruling demurrer (with exception),
4. Plea of defendant,
5. Record of trial,
6. Verdict of jury,

7. Judgment of Court,
8. Motion for a new trial and in arrest of judgment,
9. Order denying same (each),
10. Clerk's certificate to judgment-roll,
11. Petition for writ of error on behalf of defendant,
12. Assignment of errors on behalf of defendant,
13. Citation on writ of error,
14. Return thereto,
15. Order allowing writ of error and supersedeas,
16. Supersedeas bond of defendant,
17. Costs bond on appeal,
18. Bill of exceptions,
19. Writ of error (original),
20. Clerk's certificate to transcript of record, [1*]
21. Stipulations and orders of May 8, 1923; June 7th, 1923; June 29th, '23, and July 28th, 1923.

EDWARD A. O'DEA,
Attorney for Defendant.

[Endorsed]: Filed Aug. 1, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.
[2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

(Indictment.)

At a stated term of said Court begun and holden at the City and County of San Francisco within and for the Southern Division of the Northern District of California on the first Monday of March in the year of our Lord One Thousand Nine Hundred and Twenty-three.

The Grand Jurors of the United States of America within and for the Division and District aforesaid, on their oaths present: THAT

GUSTAVE JOHNSON and RAY CROXALL hereinafter called the defendants, heretofore, to wit, on or about March 23, 1923, at the City and County of San Francisco and within the Southern Division of the Northern District of California, then and there being, did then and there violate a requirement of the Act of December 17, 1914, as amended February 24, 1919, in that they did knowingly, wilfully, unlawfully, and feloniously have in their possession a certain preparation and derivative of opium, to wit, one can morphine and one finger stall containing approximately a total of 194 grains of morphine said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act, and

not then and there having paid the special tax provided for by the aforesaid Act on the said morphine.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,
United States Attorney.

[Endorsed]: A true bill.

H. B. CLIFTON,
Foreman.

Presented in Open Court and Ordered Filed Mar. 27, 1923. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [3]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 28th day of March, in the year of our Lord, One Thousand Nine Hundred and Twenty-three. Present: the Honorable ROBERT S. BEAN, District Judge.

No. 13,169.

UNITED STATES OF AMERICA

vs.

GUSTAVE JOHNSON and RAY CROXALL.

Minutes of Court—March 28, 1923—Arraignment.

In this case defendants were produced by the U. S. Marshal. On motion of G. J. Fink, Esq., Asst. U. S. Atty., and on order of Court, each defendant was duly arraigned upon Indictment filed herein.

E. A. O'Dea, Esq., was present as attorney for defendant Gustave Johnson. It appearing that defendant Ray Croxall was without counsel, the Court ordered that Mr. O'Dea be and he is hereby appointed as counsel for said defendant.

Each defendant stated his true name to be as contained in Indictment and thereupon, on motion of Mr. O'Dea, the Court ordered case continued to Mar. 31, 1923, for entry of defendants' pleas. Further ordered that defendants, in default of bonds as heretofore ordered, stand committed and that *mittimus* issue. [4]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 2d day of April, in the year of our Lord, One Thousand Nine Hundred and Twenty-three. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 13,169.

UNITED STATES OF AMERICA,

vs.

GUSTAVE JOHNSON and RAY CROXALL.

Minutes of Court—April 2, 1923—Plea of Defendants.

In this case defendants were present with Attorney, E. A. O'Dea, Esq. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. Defendants were duly arraigned upon Indictment filed herein, stated true names to be as contained therein and thereupon defendant Gustave Johnson plead "not guilty" and defendant Ray Croxall plead "guilty" of offense charged, which pleas the Court ordered and the same are hereby entered. On motion of Mr. Fink, the Court ordered case continued to April 3, 1923, for hearing on demurrer to indictment as to defendant Gustave Johnson and for pronouncing of judgment as to defendant Ray Croxall. [5]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUSTAVE JOHNSON and RAY CROXALL,
Defendants.

Demurrer to Indictment.

Comes now the defendants in the above-entitled action, and protesting their innocence of all the acts alleged against them in the indictment herein, and especially reserving and in no wise waiving their right to plead not guilty to said indictment and demur and except to such indictment and for their demurrer and exceptions thereto, urge and say:

I.

That the indictment does not state facts sufficient to constitute an offense against the laws of the United States and particularly against the provisions of the Act of December 17, 1914, as amended February 24, 1919.

II.

That said indictment is uncertain in that it cannot be ascertained therefrom how defendants were persons required to register and pay a tax under the provisions of the Act of December 17, 1914 as amended February 24, 1919.

III.

That said indictment is uncertain because it cannot be ascertained therefrom whether the defendants are charged as being dealers in narcotics and required to register or whether they obtained the narcotics above mentioned from a registered dealer in pursuance of a prescription written for the legitimate medical use of defendants. [6]

IV.

That the said indictment is uncertain in that it

cannot be ascertained therefrom why the defendants, or either of them, were persons required to pay the special tax provided for by the aforesaid Act on the said morphine.

V.

That said indictment is uncertain in that it cannot be ascertained therefrom whether the defendants had joint possession of the narcotics mentioned in the indictment or whether one defendant has possession of one can of morphine and the other defendant had possession of the finger stall containing the morphine mentioned in said indictment.

VI.

That said indictment is uncertain in that it cannot be ascertained therefrom whether the defendants, or either of them, are charged with possessing the narcotics mentioned in said indictment at the same time.

VII.

That said indictment is uncertain in that it cannot be ascertained therefrom whether the Government charges one offense against the defendants or whether the Government is attempting to charge the defendants with two offenses in one count.

VIII.

That said indictment is uncertain in that it cannot be ascertained therefrom what connection, if any, the defendants had with each other, whether one was the agent of the other, or whether each was acting independent of the other, or whether they were acting under a partnership agreement.

WHEREFORE, the defendants pray that the indictment against them be quashed and held for naught.

Dated: Apr. 2, 1923.

EDWARD A. O'DEA,
Attorney for Defendants. [7]

Due service of the within demurrer to indictment is hereby admitted this 2d day of April, 1923.

GROVE J. FINK,
Asst. United States Attorney.

[Endorsed]: Filed Apr. 2, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[8]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 3d day of April, in the year of our Lord, One Thousand, Nine Hundred and Twenty-three. Present: The Honorable JOHN S. PARTRIDGE, District Judge.

No. 13169.

UNITED STATES OF AMERICA

vs.

GUSTAVE JOHNSON and RAY CROXALL.
**Minutes of Court—April 3, 1923—Order Overruling
Demurrer.**

This case came on regularly for pronouncing of

judgment as to defendant Ray Croxall and for hearing of Demurrer to Indictment as to defendant Gustave Johnson. Said defendants were present with Attorney, E. A. O'Dea, Esq., G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. Defendant Ray Croxall was in custody of U. S. Marshal.

After hearing argument as to said demurrer on behalf of respective parties, the Court ordered that said demurrer be and the same is hereby overruled, to which order Mr. O'Dea on behalf of defendant entered an exception. On motion of Mr. Fink, the Court ordered trial set for Apr. 17, 1923.

On motion of Mr. Fink and over objection of Mr. O'Dea, further ordered matter of judgment as to defendant Ray Croxall continued to said Apr. 17, 1923. [9]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 19th day of April, in the year of our Lord, One Thousand Nine Hundred and Twenty-three. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 13,169.

UNITED STATES OF AMERICA

vs.

GUSTAVE JOHNSON and RAY CROXALL.

Minutes of Court—April 19, 1923—Trial.

This case came on regularly for trial as to defendant Gustave Johnson and for pronouncing of judgment as to defendant Ray Croxall. Said defendants were present with their attorney, E. A. O'Dea, Esq. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. Upon calling of case, all parties answering ready for such trial, the Court ordered that the same do proceed and that the Jury Box be filled from the regular panel of trial jurors of this court. Accordingly the hereinafter named persons, having been duly drawn by lot, sworn, examined and accepted, were duly sworn to try the issues herein, viz:

Jos. M. O'Malley, Chas. M. Boynton H. W. Morgan, Jos. T. Mitchell, W. H. Blanchard, A. E. Berg, Herbert P. Blanchard, George Dias, Berrien P. Anderson, A. J. Olson, Arthur C. Folsom and John W. King.

Mr. Fink made statement to the Court and Jury as to the nature of the case.

On motion of Mr. O'Dea, the Court ordered that all persons to be called as witnesses herein, except as to M. E. Dowell, be excluded from the courtroom, during the introduction of evidence, except when on the stand.

Mr. Fink then called, as witnesses on behalf of the United States, M. E. Dowell, A. A. Elliott, R. F. Love and Otto [10] Frederickson, each of whom was duly sworn and examined, and introduced in

evidence certain exhibits which were filed and marked U. S. Exhibits Nos. 1, 2 (cans and contents) and 3 (envelope and contents) and thereupon rested case of United States.

Mr. O'Dea, then moved the Court for order instructing the jury to return verdict of not guilty as to defendant Gustave Johnson, which motion the Court ordered denied.

Mr. O'Dea thereupon called the defendant, Gustave Johnson, who was duly sworn and examined in his own behalf.

The hour of adjournment having arrived, the Court, after admonishing the jury herein, ordered that the further trial of said defendant upon the indictment filed herein be and the same is hereby continued to Apr. 20, 1923, at 11 A. M., and that all parties be and appear on said day accordingly.
[11]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 20th day of April, in the year of our Lord, one thousand nine hundred and twenty-three. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 13,169.

UNITED STATES OF AMERICA,

vs.

GUSTAVE JOHNSON and RAY CROXALL.

**Minutes of Court—April 20, 1923—Trial and
Verdict.**

This case came on regularly this day for pronouncing of judgment as to defendant Ray Croxall and for further trial as to defendant Gustave Johnson. Defendants were present with their attorney, E. A. O'Dea, Esq. Defendant Ray Croxall was present in custody of U. S. Marshal. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. The jury heretofore impaneled and sworn to try said defendant was present and complete.

Mr. O'Dea called Matt. Tierney and Mrs. Marion Dexter, each of whom was duly sworn and examined as witnesses on behalf of defendant. Mr. O'Dea then called defendant Gustave Johnson, who was further examined, and thereupon rested case on behalf of defendant. Mr. O'Dea then moved the Court for order instructing jury to return verdict of not guilty and, after hearing attorneys, the Court ordered said motion denied and to which order an exception was entered.

The case was then argued by Mr. Fink and Mr. O'Dea and submitted, whereupon the Court proceeded to instruct the jury herein, who, after being

so instructed, retired at 12:08 P. M., to deliberate upon a verdict and subsequently returned into Court at 12:12 P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present, and in answer to question of the Court, stated they had agreed upon a verdict, [12] and presented a written verdict, which the Court ordered filed and recorded, viz.: "We, the Jury, find as to the defendant at the Bar, as follows: Gustave Johnson, guilty as charged. B. P. Anderson, Foreman."

Thereupon the Court ordered that the jurors herein be and they are hereby discharged from further consideration of this case and from attendance upon the court until Apr. 24, 1923, at 11 A. M., and that Juror Joseph T. Mitchell be discharged from further jury service for the term.

After hearing attorneys, the Court ordered that the matter of pronouncing of judgment as to defendant Gustave Johnson be and the same is hereby continued to Apr. 28, 1923. On motion of Mr. Fink, the Court ordered that the amount of bond for release of defendant Gustave Johnson, pending judgment, be and the same is hereby fixed in the sum of \$5,000.00 and that defendant, in default thereof, stand committed and that *mittimus* issue.

After hearing attorneys, defendant Ray Croxall was called for judgment, duly informed by the Court of the nature of the indictment filed herein, of his arraignment and plea. Defendant was then asked if he had any legal cause to show why judgment

should not be entered herein and, after hearing Officer M. E. Dowell, defendant and attorneys, no cause appearing why judgment should not be pronounced, the Court ordered that said defendant Ray Croxall, for offense of which he stands convicted, be imprisoned for period of thirteen (13) months in the United States Penitentiary at McNeil Island, State of Washington. Further ordered that said defendant stand committed to custody of U. S. Marshal for this district to execute said judgment, and that a commitment issue. [13]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 13,169.

THE UNITED STATES OF AMERICA

vs.

GUSTAVE JOHNSON, et al.

Verdict.

We, the jury, find as to the defendant at the bar as follows: Gustave Johnson, Guilty, as charged.

B. P. ANDERSON,

Foreman.

[Endorsed]: Filed April 20, 1923, at 12 o'clock and 12 minutes P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [14]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUSTAVE JOHNSON,

Defendant.

Motion for New Trial.

Now comes Gustave Johnson, defendant in the
above-entitled cause, and by Edward A. O'Dea, Esq.,
his attorney, moves the Court to set aside the ver-
dict rendered herein and to grant a new trial of
said cause and for reasons therefor, shows to the
Court the following:

I.

That the verdict in said cause is contrary to law.

II.

That the verdict in said cause was not supported
by the evidence in the case.

III.

That the evidence in said cause is insufficient to
justify said verdict.

IV.

That the Court erred upon the trial of said cause
in deciding questions of law arising during the
course of the trial which errors were duly ex-
cepted to.

V.

That the Court improperly instructed the jury to defendant's prejudice.

Dated at San Francisco, California, this 28th day of April, 1923. [15]

G. A. JOHNSON,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant, Gustave Johnson.

Due service of the within motion for new trial is hereby admitted this — day of April, 1923.

GROVE J. FINK,

Asst. U. S. Atty.

[Endorsed]: Filed Apr. 28, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUSTAVE JOHNSON,

Defendant.

Motion in Arrest of Judgment.

Now comes the defendant, Gustave Johnson, and respectfully moves the Court to arrest and withhold

judgment in the above-entitled cause and that the verdict of conviction of said defendant heretofore given and made in the said cause be vacated and set aside and declared to be null and void for each of the following causes and reasons:

I.

That the indictment on file herein does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

II.

That said indictment improperly includes two offenses without alleging same in separate counts.

III.

That this Court has no jurisdiction to pass judgment upon the defendant by reason of the fact that said indictment on file herein does not state a public offense under the laws of the United States.

IV.

WHEREFORE, by reason of the premises the defendant prays this Honorable Court that the judgment herein be arrested and withheld and that the conviction of the defendant be declared [17] null and void.

G. A. JOHNSON,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant, Gustave Johnson.

Due service of the within motion in arrest of judgment is hereby admitted this — day of April, 1923.

GROVE J. FINK,

Asst. U. S. Atty.

[Endorsed]: Filed Apr. 28, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

At a Stated Term of the Southern Division of the United States District Court, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 28th day of April, in the year of our Lord, one thousand nine hundred and twenty-three. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 13,169.

UNITED STATES OF AMERICA

vs.

GUSTAVE JOHNSON and RAY CROXALL.

Minutes of Court—April 28, 1923—Judgment.

This case came on regularly for pronouncing of judgment as to defendant Gustave Johnson, who was present with his attorney, E. A. O'Dea, Esq. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. Defendant was called for judgment, duly informed by the Court of the nature of the indictment filed herein, of his arraignment, plea and the verdict of the jury. Defendant was then asked if he had any legal cause to show why judgment should not be entered herein and thereupon Mr. O'Dea, on behalf of defendant, presented and filed motion for new trial, which

motion the Court ordered denied and to which order Mr. O'Dea entered an exception, and then presented and filed a motion in arrest of judgment, which motion the Court also ordered denied and to which order Mr. O'Dea entered an exception. Thereupon no sufficient cause appearing why judgment should not be pronounced, the Court ordered that said defendant Gustave Johnson, for offense of which he stands convicted, be imprisoned for period of three (3) years and six (6) months in the United States Penitentiary at McNeil Island, State of Washington.

Mr. O'Dea thereupon made oral petition for writ of error herein and, after hearing attorneys, the Court ordered execution of said judgment stayed for period of ten (10) days and that in the meantime, defendant go at large upon bond in sum of [19] Five Thousand (\$5,000.00) Dollars. Further ordered that in default of such bond, said defendant stand committed and that commitment issue.

Defendant Ray Croxall was present in Court in custody of the U. S. Marshal, and after hearing defendant and Mr. Fink, the Court ordered that the judgment heretofore entered herein against said defendant Ray Croxall, on April 20, 1923, be and the same is hereby vacated, set aside and held for naught. Further ordered that said defendant Ray Croxall, for offense of which he stands convicted herein, be imprisoned for period of six (6) months in the County Jail, County of San Francisco, State of California, and that said defendant

stand committed to custody of U. S. Marshal to execute said judgment of imprisonment, and that a commitment issue. [20]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,169.

THE UNITED STATES OF AMERICA

vs.

GUSTAVE JOHNSON, et al.

Judgment on Verdict of Guilty.

Grove J. Fink, Esq., Assistant United States Attorney, and the defendant with his counsel came into Court. The defendant was duly informed by the Court of the nature of the indictment filed on the 27th day of March, 1923, charging him with the crime of viol. Act of Dec. 17, 1914, as amended Feb. 24, 1919, known as Harrison Narcotic Act; of his arraignment and plea of not guilty; of his trial and the verdict of the jury on the 20th day of April, 1923, to wit:

“We, the Jury, find as to the defendant at the bar as follows: Gustave Johnson—Guilty as charged.

B. P. ANDERSON,

Foreman.”

The defendant was then asked if he had any legal cause to show why judgment should not be entered

herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment: THEREUPON the Court rendered its judgment: THAT, WHEREAS, the said Gustave Johnson having been duly convicted in this Court of the crime of viol. Act of Dec. 17, 1914, as amended Feb. 24, 1919;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Gustave Johnson be imprisoned for the period of three (3) years and six (6) months in the United States Penitentiary at McNeil Island, State of Washington.

Judgment entered this 28th day of April, A. D. 1923.

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [21]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 13,169.

UNITED STATES OF AMERICA

vs.

GUSTAVE JOHNSON and RAY CROXALL.

(Certificate to Judgment-Roll.)

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of Cali-

formia, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and seal of said District Court this 28th day of April, 1923.

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [22]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

GUSTAVE JOHNSON,

Defendant.

Stipulation and Order Extending Time to and Including June 7, 1923, to Settle Bill of Exceptions.

It is hereby stipulated by and between counsel for the above-mentioned parties that the defendant may have to and including the 7th day of June, 1923, in which to lodge and settle his proposed bill of exceptions upon order allowing a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated this 8th day of May, 1923.

GROVE J. FINK,
Asst. United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant.

So ordered.

Dated this 8th day of May, 1923.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed May 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [23]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUSTAVE JOHNSON,

Defendant.

Stipulation and Order Extending Time to and Including June 30, 1923, to Settle Bill of Exceptions.

It is hereby stipulated by and between counsel for the above-mentioned parties that the defendant may have to and including the 30th day of June, 1923, in which to lodge and settle his proposed bill

of exceptions upon order allowing a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated this 7th day of June, 1923.

J. T. WILLIAMS,
United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant.

So ordered.

Dated this 7th day of June, 1923.

VAN FLEET,
United States District Judge.

[Endorsed]: Filed Jun. 7, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[24]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,169.

UNITED STATES OF AMERICA, .

Plaintiff,

vs.

GUSTAVE JOHNSON,

Defendant.

Stipulation and Order Extending Time to and Including July 28, 1923, to Settle Bill of Exceptions.

It is hereby stipulated by and between counsel for the above-mentioned parties that the defendant

may have to and including the 28th day of July, 1923, in which to present and settle his proposed bill of exceptions upon a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit.

It is hereby further stipulated that the time to present and settle the bill of exceptions of said defendant upon writ of error herein be extended and continued from the present March, 1923, Term to and into the next succeeding, July, 1923, Term of this Court.

Dated this 29th day of June, 1923.

JOHN T. WILLIAMS,
S.

United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant.

So ordered.

Dated this 29th day of June, 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Jun. 29, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[25]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUSTAVE JOHNSON,

Defendant.

Stipulation and Order Extending Time to and Including August 27, 1923, to Settle Bill of Exceptions.

It is hereby stipulated by and between Counsel for the above-mentioned parties that the defendant may have to and including the 27th day of August, 1923, in which to settle and present his bill of exceptions, upon a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit.

It is hereby further stipulated that by order of the Court made and entered on the 29th day of June, 1923, that the time to settle said bill of exceptions had been extended and continued from the March term into the next succeeding July term of this Court.

Dated this 27th day of July, 1923.

JOHN T. WILLIAMS,
United States Attorney.

EDWARD A. O'DEA,
Attorney for Defendant.

So ordered.

Dated this 28th day of July, 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Jul. 28, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[26]

In the Southern Division of the United States District Court for the Northern District of California.

No. 13,169.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

GUSTAVE JOHNSON,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that heretofore, the Grand Jury of the United States in and for the Northern District of California, First Division, did find and return into and before the above-entitled Court its indictment against the defendants, Gustave Johnson and Roy Croxall, and that, thereafter, the said Gustave Johnson and Roy Croxall appeared in Court and upon being called to plead to said indictment filed a demurrer to said indictment as shown by the record herein and the said demurrer being overruled by the said Court, the defendant, Gustave Johnson, pleaded not guilty and the defendant, Roy Croxall, pleaded guilty as shown by the record herein;

AND BE IT FURTHER REMEMBERED, that the defendant, Gustave Johnson, who will hereafter be called the defendant, having duly pleaded not guilty, and the cause being at issue, the same came on for trial before the Honorable John S. Partridge, District Judge of said Court, and a jury duly impaneled, the United States being represented by Grove L. Fink, Esq., Assistant United States Attorney, and the defendant being represented by Edward A. O'Dea, Esq., and the following proceedings were had:

Grove L. Fink, Esq., Assistant United States Attorney made an opening statement of the case to the jury. The plaintiff to maintain the issues on its part to be maintained, introduced and offered in evidence the following testimony, to wit: [27]

Testimony of M. E. Dowell, for the Government.

M. E. DOWELL, called for the United States, being sworn, testified as follows:

Direct Examination.

I am a police officer assigned to the Detective Bureau of San Francisco, California. I have been in the police department fourteen years and ten months and was a police officer on the 23d day of March. I know the defendant, Gustave Johnson. I saw him on March 23, 1923, at the Detective Bureau of San Francisco at twelve o'clock noon. Mr. Croxall, a codefendant, was there also. From the police station, Croxall, Johnson, Police Officer Frederickson and myself went to 882 Fulton Street,

(Testimony of M. E. Dowell.)

San Francisco, California, where the defendant, Johnson, said he resided, said it was his place, and Frederickson and I searched the premises.

At this point Mr. O'Dea obtained permission to cross-examine the witness on his right to search the residence of the defendant, Gustave Johnson, and in response to his questions the witness testified as follows:

I did not have a search-warrant to enter the premises. I made no application for a search-warrant. Mr. Johnson requested that we go out there. I had no information before I went out there that the defendant was engaged in the traffic of selling narcotics. I did not go out there to search for narcotics. We had information that a theft had been committed and the number of a certain automobile was registered in the theft and the defendants, Johnson and Croxall, were seen getting into this car, the two defendants were arrested on Fulton Street in possession of this car and were brought into the Detective Bureau for investigation, and Detective Frederickson and myself were assigned to this case. We went out there to see what he had in the place, as he had denied the charge of having committed any theft of any kind and requested that we go with him to the house where he lived. He gave us permission to go out there to search [28] for articles we thought were stolen and nothing was said in regard to narcotics.

(Testimony of M. E. Dowell.)

Exception No. 1.

Mr. O'DEA.—I make a formal motion at this time that any evidence taken by means of the search of the police officers of this man's house without either a State, or National or Federal search-warrant be excluded, and for the reason that the man is compelled to testify against himself.

The COURT.—The motion will be denied.

Mr. O'DEA.—Exception.

At this point, the direct examination was resumed and the witness testified further, as follows:

Upon arriving at 882 Fulton Street in this city, county and State, we went into the premises there and there were two rooms that he occupied with Mr. Croxall and a woman that he claimed to be living there with as his wife. I found a trunk there which was locked and I asked Mr. Johnson who the trunk belonged to and he said "It belongs to me." We tried to get into the trunk but it was locked and in a few minutes Mr. Johnson said, "Do not break the trunk open. I will give you the key." So Johnson gave me the key, I opened the trunk, and in the top drawer of the trunk I found a can and picking up the can I saw it was an ounce can which contained morphine. I asked Mr. Johnson what it was and he said it was morphine. I asked him who it belonged to and he said "It belongs to me." Detective Frederickson, Croxall, Johnson and myself were present. I conducted a

(Testimony of M. E. Dowell.)

further search of the premises. I searched a bureau drawer which was in the front room where Johnson was and I found a number of needles. Johnson admitted that they belonged to him, and in a room in the rear where Johnson and Croxall were sitting I found another ounce can, another ounce morphine can, and Johnson admitted that that belonged to him and it had contained morphine, and that he had used it and that he bought the morphine up [29] north. In the room that was occupied by Croxall, Johnson told me to look on the shelf. He said that I would find the needle and syringe that was used in taking the shots of morphine and I searched there and found it as he stated. The can is now in the same condition as I found it, save and except for a sample was taken from it for analysis. It did not have any stamps on it of any kind. I took them to the police station and booked them in the Property Clerk's office as evidence against the defendants.

Exception No. 2.

Mr. FINK.—I ask your Honor at this time that the larger of the two cans, the one which will be shown to contain morphine, be marked for identification Government's Exhibit No. 1. I ask that the smaller of the two cans be at this time introduced in evidence and marked U. S. Exhibit No 2.

Mr. O'DEA.—I object to the introduction of any of this evidence at this time on the ground that it was taken in violation of the defendant's rights

(Testimony of M. E. Dowell.)

guaranteed to him under the Fourth and Fifth Amendments to the Constitution of the United States, and under Sections 13 and 19 of Article I of the Constitution of the State of California.

The COURT.—Overruled.

Mr. O'DEA.—Exception.

On cross-examination the witness testified as follows:

I had no evidence that the defendant, Johnson, was peddling narcotics. I charged the defendant with a violation of the State Poison Law. He is no longer charged with that offense. I requested that it be dismissed. I talked the matter over with the Captain of Detectives and he requested that the matter be turned over to the Government. I do not know why the man (Johnson) was turned over to the Government instead of being prosecuted by the State authorities, no more than the orders of the Captain. It is not a fact that I brought Johnson from the [30] State Court where he was charged, to this Court, because he would be dealt with more leniently in the State Court.

Exception No. 3.

Mr. O'DEA.—Do you know what the punishment is for a violation of the State Poison Law, where mere possession is charged, the first offense?

Mr. FINK.—That is objected to.

The COURT.—You have no right to ask that. You needn't answer that, Mr. Dowell.

(Testimony of M. E. Dowell.)

Mr. O'DEA.—You made no attempt to prosecute him in the State Court for this offense?

Mr. FINK.—Objected to as having been already asked and answered.

The COURT.—Sustained.

Mr. O'DEA.—Exception.

Johnson stated that he had been a user of narcotics. He said that to me at the time of the arrest. He requested that I give him permission to take a shot of morphine. Mr. Johnson had the keys before we went out to 882 Fulton Street. When I went to the premises at 882 Fulton Street I did not see any other person there besides Croxall and Johnson. Officer Frederickson was with me. Mrs. Dexter was not there with us; she was at the Detective Bureau being detained there at that time. It is not a fact that Mrs. Dexter handed me the keys and that I brought them out there. The defendant, Johnson, did not have the finger-stall of morphine on him. Croxall did. I did not see the defendant, Johnson, give the defendant, Croxall, the finger-stall of morphine. Johnson did not give the finger-stall of morphine to Croxall in my presence. The finger-stall of morphine was found on the other defendant, Roy Croxall, when he was searched in the City Prison.

It is not a fact that I might have gotten the keys from somebody else. Johnson was handcuffed. We had Johnson and [31] Croxall handcuffed together in the room, and Johnson requested us not to break the trunk open, that he had the keys and

(Testimony of M. E. Dowell.)

he raised up off the chair and went through his clothes and got the keys, and threw them across to me, a distance of probably ten feet. I would not say positively as to what I did with the keys but to the best of my recollection they were given back to Johnson. I did not give the keys back to Mrs. Dexter. I would not want to state positively that I did not give her the keys but to the best of my recollection I gave the keys back to Johnson at his home. I do not remember which one of Johnson's pockets he got the keys from. I did not find any stolen goods at 882 Fulton Street. I did not charge the defendant with having stolen goods. When the defendant, Johnson, admitted the possession of the narcotics he was handcuffed. I did not tell him it would be better for him to tell the truth concerning the narcotics. He requested that I not arrest him for the narcotics nor book him for the narcotics. He made the remark when he said that the narcotics was morphine "You are not going to charge me with that, are you?"

Testimony of A. A. Elliott, for the Government.

A. A. ELLIOTT, called for the United States, being sworn, testified as follows:

Direct Examination.

My occupation is narcotic inspector. Internal Revenue Service, Narcotic Division. I have been in that service four years in May. This wrapper which contains two cans has been in my possession.

(Testimony of A. A. Elliott.)

I first got them at the property clerk's office down at the Hall of Justice. After I got them there, I immediately brought them to our office, took out sample and wrapped them up in this paper and turned them over to Mr. Writesman, of the Department, to put them in the vault. I took the samples to the chemist, the larger of the two cans is now in the same condition as it was when I first received it. There were no stamps of any kind. I got the cans on the morning of the 24th. [32]

Testimony of R. F. Love, for the Government.

R. F. LOVE, called for the United States, being sworn, testified as follows:

Direct Examination.

My occupation is Internal Revenue Chemist. I have been an Internal Revenue Chemist for five years. I am stationed at San Francisco, California (Counsel for the parties stipulated that Mr. Love was a qualified chemist in the employ of the United States Government). The envelope containing two small packages Mr. Elliott brought to me. I identified the two small packages as follows: One is labeled "taken from finger-stall found on Croxall"; the other is labeled simply "taken from can found in room at 882 Fulton Street." I made a chemical analysis of both. I can state the contents of the small packages. The contents contained morphine. Morphine is a derivative of opium.

Mr. FINK.—I ask that this envelope containing the two small packages of morphine be introduced

(Testimony of Otto Frederickson.)

in evidence and marked United States Exhibit No. 3. I ask at this time that Government's Exhibit 1 for identification be introduced in evidence and given the same number. (Government's Exhibit 1 for identification was here marked Government's Exhibit 1.)

Mr. O'DEA.—I object to the introduction of the finger-stall against the defendant, Johnson, as immaterial, irrelevant and incompetent, upon the further ground that no connection has been shown between Johnson and that finger-stall. (Finger-stall contained morphine.)

The COURT.—I will sustain the objection.

Exception No. 4.

Mr. O'DEA.—I will object to the introduction of the can of morphine on the ground that it was taken in violation of the defendant's rights guaranteed to him under the Fourth and Fifth Amendments to the Constitution of the United States. [33]

The COURT.—The objection will be overruled.

Mr. O'DEA.—Exception.

Testimony of Otto Frederickson, for the Government.

OTTO FREDERICKSON, called for the United States, being sworn, testified as follows:

Direct Examination.

My occupation is a police detective, at the Hall of Justice, San Francisco. I am connected with the Police Department of the City and County of San

(Testimony of Otto Frederickson.)

Francisco and have been such for sixteen years next July. I was a police officer on March 23, 1923. I only know the defendant, Gustave Johnson, from having seen him once before. I know the defendant, Ray Croxall, only from having seen him one day. I saw Gustave Johnson on March 23, 1923. The defendant, Johnson, and Croxall were brought to the Hall of Justice on a larceny charge. From the Hall of Justice, we took Johnson and Croxall to 882 Fulton Street, in this City, county and State. There were four of us, Croxall, Johnson, Officer Dowell and myself. Upon arriving at 882 Fulton Street we went into the premises to make a search for evidence on a larceny investigation. We found nothing on the outside, that is, on any of the shelves to connect them with what we were looking for in regard to the larceny charge. We asked them about a certain trunk there was in the front room. Dowell asked "Who does the trunk belong to?" Johnson said "To me." Dowell said "What is in the trunk?" Johnson said "Clothes and other effects. It is locked. I have got the key here for it. I will unlock it." So Dowell opened the trunk and after looking through the clothes and stuff, he took out a can which was about half full.

Exception No. 5.

Mr. O'DEA.—At this time, I want to interpose an objection to any of this testimony on the ground that an illegal search and seizure was made in violation of the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the

(Testimony of Otto Frederickson.)

United [34] States and under Sections 13 and 19 of Article I of the Constitution of the State of California.

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

Witness continuing, testified: On taking out the can Dowell says, "Why that is morphine" and he admitted that it was. Defendant Johnson admitted that it was morphine. Dowell asked, "Are you selling this stuff?" and he said, "I have got that for my own use." We asked him how long it would take him to use that amount he had left and he said, "I am off the stuff now, I only use a very small amount of it, probably it will take six months to a year to use." We conducted a further search of the premises and we found some hypodermic needles. They were not complete, so Detective Dowell asked defendant, Johnson, where the remaining portion of them were, and he said, "You will find them under the dish rag in the kitchen"; that was the room occupied by Croxall. We found one other can in the kitchen. He said that the can belonged to him and it also had contained morphine. There were no Federal officers or employees with us when conducting the search at 882 Fulton Street.

Exception No. 6.

Mr. FINK.—I hand you Government Exhibits Nos. 1 and 2, in evidence, which were formerly contained in that wrapper, and ask you whether these are the cans that you found at that time and place?

(Testimony of Otto Frederickson.)

Mr. O'DEA.—We will object to that question, if your Honor please on the grounds already suggested.

The COURT.—Overruled.

Mr. O'DEA.—Exception.

The cans are similar to these; there were two; there was a little difference in the size of them. There were no stamps on them; they are in the same condition now that they were in at the time I took them save and except, of course, a sample being taken [35] from the larger of the two cans.

On cross-examination, the witness testified as follows:

We looked for stamps on the cans; the cans were open; they had no visible stamps. We did not have a search-warrant. We left the police station somewhere along about 12:30 or 12:40. At the time there were a number of Police Judges and Superior Judges in the Hall of Justice. I had the opportunity to procure a search-warrant if I thought it necessary. I do not know how it happened that the narcotics were turned over to the Federal Government. I do not know who swore to the complaint against the defendants. I did not accompany Detective Dowell into Captain Matheson's office. I made the casual remark to Captain Matheson that we had found some morphine at the place. In the first place, Johnson and Croxall were brought to the Hall of Justice by Officer Tierney and Officer Kreegan. They had arrested them without a warrant on suspicion on a larceny charge and turned the de-

(Testimony of Otto Frederickson.)

defendants over to us for investigation. As soon as they brought them to the Hall of Justice we immediately went out in a machine driven by Johnson at his own solicitation. I went into the premises to search for stolen goods and to investigate the premises. We did not find any stolen goods. We looked through all the rooms. When we were there we wanted to see the trunk. It was locked. I saw Detective Dowell get the key. He got it from Johnson. Of that, I am positive. There was no woman there. There was a woman down at the Hall of Justice. She was not under suspicion. The woman was brought down because she was with them when they were apprehended through the license number on the automobile which belonged to her. I do not know whether she is an addict or uses morphine. She lived at 882 Fulton Street with Johnson. Her last name is Dexter. I did not get the keys from her. The keys for the machine were not given to me in the Hall of Justice. Johnson had the keys because Johnson drove the machine out there. We did not search Johnson's person for stolen goods. Johnson volunteered the keys for the trunk. I did not open the [36] trunk. I saw it opened. Dowell was making the search of the trunk. I saw some clothes. Women's wearing apparel, among other things, and Officer Dowell found that can and said, "This is morphine." I did not examine the trunk to see any male wearing apparel there. I did not notice any wearing apparel of Johnson's in that trunk. I had no information that Johnson was en-

(Testimony of Otto Frederickson.)

gaged in the traffic of narcotics. Johnson had no other conversation with us at 882 Fulton Street than that the can belonged to him; that it contained morphine and that he was a user himself. At the time Croxall was sitting handcuffed to Johnson.

On redirect examination, the witness testified as follows:

When the two officers from Bush Street Station brought Johnson and Croxall to the Station, it was in regard to a larceny that had been committed, an attempted larceny on a fellow named Cross George on Laguna and Post Streets and the number of the automobile had been obtained from which the officers located the defendants at 882 Fulton Street. They were then brought to the Bureau. The case had been assigned to us for investigation. That is how we came to go to 882 Fulton Street.

On recross-examination, the witness testified as follows:

In the rooms, there was one trunk that was opened and there was another steamer trunk. I think there was a big suit case in Croxall's room. I don't know whether there were more trunks or not. I would not be positive that there were two trunks and a suit case. One was locked, that is the one that Detective Dowell got the key from Johnson for. I did not see the contents of the second trunk. I did not ask for the keys for the trunk. I had the possession of the keys to drive the machine. I drove the machine back. I believe that was the same key ring

(Testimony of Otto Frederickson.)

as that which you (O'Dea) have in your hand. I'm not sure whether all of these keys were on the ring at the time. I got the key ring from Detective Dwell. I did not return the keys to the defendant, Johnson.

At this point, Mr. Fink announced, the Government rests. [37]

Exception No. 7.

Mr. O'DEA.—I would ask, if your Honor please, for a directed verdict of not guilty upon the ground that the evidence is insufficient to substantiate the charge; 2d, the defendant is charged with possessing a can of morphine and possessing a finger-stall of morphine, and there is no evidence at all here to connect the defendant up with the finger-stall of morphine and on the further ground that any and all evidence that was received here was taken in violation of the defendant's Constitutional rights.

The COURT.—The motion is denied.

Mr. O'DEA.—Exception.

That thereupon, the defendant, Johnson, to maintain the issues on his part to be maintained, introduced and offered in evidence the following testimony, to wit:

Testimony of Gustave Johnson in His Own Behalf.

GUSTAVE JOHNSON, called in his own behalf, being sworn, testified as follows:

Direct Examination.

I live at 882 Fulton Street. I am addicted to the

(Testimony of Gustave Johnson.)

use of narcotics ever since I was operated on in 1908 and had the end of my spine cut off. I have been in San Francisco since last January. I never sold narcotics. I am not a dealer in narcotics. I was not present when these keys were given to the officers. I drove the machine out to the house at 882 Fulton Street, then we went into the house and they handcuffed us. We went into the front room of Mrs. Dexter at that time. I saw the police officer search the trunk. The trunk was Mrs. Dexter's. There were two trunks in that place, a wardrobe trunk and a flat trunk. The wardrobe trunk belonged to Mrs. Dexter. I had a suit hanging in the closet and some shirts and underwear and neckties and things like that. I did not give them the keys to open that trunk. I gave them the keys that would open one drawer, the top [38] drawer of the wardrobe trunk. It was on a little brass ring with the key to the front door, two keys. I did not own the finger-stall of morphine.

On cross-examination, the witness testified as follows:

I saw the trunk searched. When he opened it he pulled out a pillow and some towels, some two or three hundred pieces, little square pieces of different colored cloth that she was making what they call a crazy-quilt and some sheets and pillow cases. There was no wearing apparel then in that flat bottom trunk that had the morphine in it. None whatever. There was, however, this can in it. There were no

(Testimony of Gustave Johnson.)

men's shirts or men's pants or trousers in it. I did not see any can taken out. I had my back to him. He walked over in front of the dresser and held it up and made the remark, "Here it is." He said it was morphine and I said, "I guess it is." I said it belonged to me. This other can was found out in the kitchen, in the room of Mr. Croxall. I do not remember having any conversation about the smaller of the two cans. I do not remember saying that the smaller can belonged to me and that I had morphine in it. The can with the morphine in it, I said that was mine. I have been convicted of a felony in 1910, at Oakland, California. The offense was grand larceny and the judgment of the Court was six years in San Quentin. I drove the car from the police station to 882 Fulton Street. When I went into the police station from the car the engine was turned off. It required a key to start it. I did not have the key. I got the key from Mr. Dowell. Mr. Dowell got them from the officer who made the arrest who first came to the house from the Bush Street Station. I believe that he handed them to Mr. Frederickson who was sitting in the front with me and I took them from him and stuck it in the keyhole. I started the car. I opened the front door with the key that I had. There were two keys for the car. Mrs. Dexter had one on a ring and I had one separate.

On redirect-examination, the witness testified as follows: [39]

I do not remember from whom the police officer

(Testimony of Gustave Johnson.)

got the keys to open the trunk. When we first got down to the Hall of Justice I went to lock the tool box on the car and the officer who was sitting in the front seat with me had the keys. I don't know what his name is. It was one of the two officers that came with us. It was not Officers Dowell or Frederickson.

Testimony of Matt Tierney, for the Defendant.

MATT TIERNEY, called in behalf of the defendant, Gustave Johnson, being sworn, testified, as follows:

Direct Examination.

I am a police officer of the city and county of San Francisco. I am detailed to the Bush Street Station. I know Gustave Johnson. I knew him on the 23d day of March, 1923. I saw another gentleman with Mr. Johnson and a lady. I got two keys from Mrs. Dexter that day, as we were about to leave the place and lock up. I turned the keys over to Detective Dowell and Detective Frederickson up at the Detective Bureau at the Hall of Justice.

On cross-examination, the witness testified as follows:

I got the keys from Mrs. Dexter. There were two keys there, one to the front door and one to the room door. They were not on a ring. I did not get any keys from Mr. Johnson.

Testimony of Mrs. Marion Dexter, for the Defendant.

MRS. MARION DEXTER, called in behalf of the defendant, Gustave Johnson, being sworn, testified as follows:

I know the defendant, Gustave Johnson. I was present when Mr. Johnson was arrested. I saw the police officers at the time. I gave one of the officers a bunch of my keys to 882 Fulton Street at the house just as I was leaving the rooms.

On cross-examination, the witness testified, as follows:

I was living at 882 Fulton Street in two rooms in the front, occupied by Mr. Johnson, Mr. Croxall and myself. I am [40] not the wife of Mr. Johnson. I think that there were more than two keys on the bunch, three or four, I think. They were on a key ring.

Testimony of Gustave Johnson, in His Own Behalf (Recalled).

GUSTAVE JOHNSON, recalled in his own behalf, being sworn, testified as follows:

Direct Examination.

I never imported any narcotics into the country. I never manufactured any narcotics. I never produced any narcotics. I never compounded any narcotics. I never sold any. I never dealt in any narcotics. I never dispensed a narcotic. I never gave

(Testimony of Gustave Johnson.)

any narcotics away. I had in my possession certain narcotics. I had them for my own use. I had been addicted to the use of narcotics ever since I had my spine cut off, since 1908, fifteen years. I did not give the police officers permission to enter my premises.

On cross-examination, the witness testified as follows:

I don't remember just when it was in 1908 that I had that operation. I don't remember the month. I was in Los Angeles along the first part of the summer of the year 1908 and I came up to San Francisco. I think it was in May. It was shortly after May, 1908, that I was taken with a pain from the base of my brain to the end of my spine and I went along with a pain for two months before the doctors discovered a formation on the end of my spine and I was operated on and the end of my spine cut off, of which I can show you the scar.

Exception No. 8.

Mr. FINK.—Mr. Johnson, I just want you to use the best recollection you can; I know that is all you can do, and state to me just exactly what month, as near as you can remember it, you had the operation. I think it is important.

Mr. O'DEA.—We object to that on the ground that it is immaterial, if your Honor please. Perhaps Mr. Fink is going to [41] refer to the conviction of a felony, again, and the defendant has already admitted that.

(Testimony of Gustave Johnson.)

The COURT.—Overruled.

Mr. O'DEA.—Exception.

ANSWER.—I think it was in September or October, as near as I can remember.

Exception No. 9.

Mr. FINK.—Well, now, for the purpose of refreshing your recollection, and that only do you know where you were from May until November, in the year 1908?

Mr. O'DEA.—If your Honor please, that is not a proper impeaching question. If that question is asked for the purpose of impeachment, the proper question to ask was he ever convicted of a felony. This is the defendant on the stand, and he is not like any other witness. He has admitted that he has been convicted of a felony.

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

ANSWER.—I was between Oakland and my mother's home. I was not out of the state.

On redirect examination, the witness testified as follows:

In 1908, I was addicted to the use of narcotics and I am now.

Exception No. 10.

Mr. O'DEA.—If your Honor please, I move that all of the evidence pertaining to the search of the defendant's premises be stricken out on the ground that whatever was taken was taken in violation of the defendant's Constitutional rights.

The COURT.—I will state, Mr. O'Dea, that I have studied this matter quite carefully both in these cases and others, and I am satisfied that the motion should be denied.

Mr. O'DEA.—Exception. [42]

That, thereupon, the defendant rested.

Exception No. 11.

Mr. O'DEA.—If your Honor please, at this time, I desire to make a motion for a directed verdict, first upon the ground that the evidence was illegally seized, second, that the indictment does not state any public offense, third that the evidence is insufficient to convict the defendant.

Mr. O'DEA.—The indictment charges the defendant with having in his possession certain derivatives of opium, to wit, one can of morphine and a finger-stall containing 194 grains, he being a person required to register and not having paid the tax. Now, the defendant to be specific is charged under Section VIII of the Harrison Narcotic Act, "That it shall be unlawful for any person not registered under the provisions of this Act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of Section 1 of this Act."

The COURT.—What page is that on?

Mr. FINK.—Page 16, your Honor, of the Regulations, Section 8.

Mr. O'DEA.—Now, Section 1 enumerates certain classes of people—"That or or before July first in each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative or preparation thereof, shall register with the Collector of Internal Revenue." In this connection, I call your Honor's attention to the fact that there is absolutely no evidence that this person imported, manufactured, produced, compounded, sold, dealt in, dispensed or gave away opium or coca leaves, or their derivatives. Those are the persons who are required to register, the persons who import, manufacture, produce, compound, sell, deal in, dispense, or give away narcotics. I call your Honor's attention to the case of *Gin Foo* [43] *Moy*, 241 U. S. 394. The opinion is a very short one, and I will read it to your Honor. (Reads) . . . There is no evidence, if your Honor please, that the defendant is charged with being a dealer, nor is he charged with being a person required to register. There is not a scintilla of evidence that he had ever dealt in narcotics, that he ever sold any, that he ever compounded any, that he ever produced any, or that he gave them away. The only evidence in the case is that the man has been a user of narcotics, and that he had narcotics in his possession, which he says were for his own use, and he is charged not with producing it. There is no evidence here that he was a person required to pay any tax; he is not charged with being a per-

son producing, compounding, selling, dealing in, dispensing or giving away narcotics. The evidence before your Honor is that he is not a dealer, and, therefore, he is not a person required to register under the act.

Mr. FINK.—Your Honor, unless I misread the case of United States vs. Wong Wing, I think the matter presented by Mr. O'Dea is settled by that decision. However, it is to be noted that Section 8 of the Harrison Narcotic Act specifically provides for all of the provisions of Section 1 of the Act, and while Mr. O'Dea has pointed out a portion of Section 1 of the Act to your Honor, he has carefully refrained from pointing out another portion of Section 1 which reads: "It shall be unlawful for any person to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package, or from the original stamped package; and the absence of appropriate tax paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be *prima facie* evidence of liability to such special tax." [44]

I point out to your Honor that the Moy decision was rendered by the Supreme Court prior to the Amendment of February 24, 1919, and that in the meantime the case of United States vs. Wong Wing covers the point directly in question here.

Mr. O'DEA.—It has not overruled the decision in the case that I cited to your honor.

The COURT.—I have listened to you because you seemed very earnest about it. I have had occasion to study and consider this matter four or five times in the last few weeks and I am perfectly clear that Section 8, which provides that it is unlawful for any person to have opium in their possession except under special circumstances, and certain special classes of persons. The motion will therefore be denied.

Mr. O'DEA.—I note an exception.

(That, thereupon counsel proceeded to argue the case, at the conclusion of which the following proceedings were had.)

Charge to the Jury.

The COURT. (Orally.)—Gentlemen of the Jury: In this case the indictment is against two men, Gustave Johnson and Ray Croxall. Ray Croxall has pleaded guilty and is, therefore, out of the case. In determining and considering your verdict you are not in any wise to consider the fact that Croxall has pleaded guilty. The police officers here have testified that they went to the house of the defendant, Johnson, at his request and upon his invitation. The defendant, Johnson, denies that. If you find from the evidence beyond a reasonable doubt that the defendant, Johnson, did invite the officers to go there, then I instruct you that under the law which is presented herein evidence is properly before you and is to be considered by you. If you

find, on the contrary, that the defendant did not invite the officers to go there, then you are not entitled to take into consideration the material object presented here, namely, the can of morphine. [45]

The statute under which this indictment is brought makes it a crime for any person to have morphine in his possession, except certain persons who have registered and paid the tax. The statute also provided that the possession of morphine is *prima facie* evidence that he has not registered and has not paid the tax. Therefore, if the Government has established to your satisfaction that the defendant did have this morphine in his possession, then it was incumbent upon the defendant to overcome that *prima facie* showing by proving that he had registered and had paid the tax. He has offered no such evidence in this case, and there is no pretense of any such thing.

The presumption of innocence which attaches to every person charged with a crime follows at all deliberations and all stages of the case until it is finally determined by the whole twelve of the jury. This defendant, like all defendants, is entitled to that presumption. The Government, in order to overcome that presumption of innocence, must establish the possession of morphine by this defendant beyond a reasonable doubt.

There has been evidence introduced here, and an admission on behalf of the defendant, that he was convicted of a felony. You are not to consider that conviction of a felony for any but one purpose in this case, and that is as bearing upon the credibility

of the witness himself. For all other purposes you will eliminate it from your minds entirely.

Exception No. 12.

Mr. O'DEA.—I wish your Honor to give this instruction: "You are instructed that if you find from the evidence that the defendant, Gustave Johnson, was merely a consumer, a user or an addict to the use of narcotics and had the narcotics mentioned in the indictment in his possession for his own use and did not import, manufacture, produce, compound, sell, deal in, dispense or give away opium or coca leaves, or any compound, manufacture, salt, derivative or preparation thereof, then he was a person not required to register under the provisions of the Act and you [46] must return a verdict of "Not Guilty."

The COURT.—You have presented that instruction to me. That instruction is denied.

Mr. O'DEA.—Exception.

Exception No. 13.

Mr. O'DEA.—And also the first instruction that I have requested. Does your Honor know that one? Which said instruction was as follows: You are instructed that there is no presumption of law created in the Act of December 17, 1914, as amended February 24, 1919, which is superior to or overcomes the presumption of innocence with which the defendant is clothed from the time of his arrest to the end of the jury's deliberations.

The COURT.—I know it. Denied.

Mr. O'DEA.—Exception.

Exception No. 14.

Mr. O'DEA.—And also the fourth instruction that: It is not necessary under any law for the defendant to prove his innocence but the burden rests upon the prosecution to establish every element of the crime with which he is charged and every element of the crime must be established to a moral certainty and beyond all reasonable doubt. If the prosecution failed to establish to a moral certainty that the defendant was a person required to register and did not register under the provisions of the Act for the possession of the narcotics mentioned in the indictment then it is your duty to acquit the defendant. If the prosecution failed to establish to a moral certainty and beyond all reasonable doubt that the defendant had not paid the tax required for the possession of said narcotics then it is your duty to acquit the defendant.

The COURT.—Under the rule, Mr. O'Dea, all you have to do is to refer to the number of the instruction, where you have presented it in writing.

Mr. O'DEA.—The fourth instruction. (Just referred to.) [47]

The COURT.—Denied.

Mr. O'DEA.—Exception.

(Thereupon at 12:08 the jury retired, and at 12:12 returned into Court with a verdict of guilty as charged.)

Thereupon the said Court continued said case to the 28th day of April, 1923, for judgment.

Thereafter, on the 28th day of April, 1923, the day set by the Court for the pronouncement of sen-

tence upon the defendant, the defendant was called to the bar of the Court to show cause and asked to show cause, if any he had, why sentence should not be pronounced upon him according to law. Thereupon, the attorney for defendant, presented to the Court a motion for a new trial which motion for new trial was in words and figures following, to wit:

MOTION FOR NEW TRIAL

Now comes Gustave Johnson, defendant in the above-entitled cause, and by Edward A. O'Dea, Esq., his attorney, moves the Court to set aside the verdict rendered herein and to grant a new trial of said cause and for reasons therefor, shows to the Court the following:

I.

That the verdict in said cause is contrary to law.

II.

That the verdict in said cause was not supported by the evidence in the case.

III.

That the evidence in said cause is insufficient to justify said verdict.

IV.

That the Court erred upon the trial of said cause in deciding question of law arising during the course of the trial which errors were duly excepted to. [48]

V.

That the Court improperly instructed the jury to defendant's prejudice.

Dated at San Francisco, California, this 28th day of April, 1923.

GUSTAVE JOHNSON,
Defendant.

EDWARD A. O'DEA,
Attorney for Defendant, Gustave Johnson.

[Endorsed]: Filed April 28, 1923. Walter B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.
Received Copy April —, 1923.

GROVE L. FINK,
Asst. U. S. Attorney.

Exception No. 15.

Said motion for new trial was argued by the attorney for the defendant and was submitted to the Court for its decision and after due consideration, the Court denied the motion for a new trial and the defendant then and there duly and regularly excepted.

Thereafter on the same day, Edward A. O'Dea, Esq., Attorney for the defendant presented to the Court a motion in arrest of judgment which motion was in the words and figures following, to wit:

MOTION IN ARREST OF JUDGMENT

Now comes the defendant, Gustave Johnson, and respectfully moves the Court to arrest and withhold judgment in the above-entitled cause and that the verdict of conviction of said defendant heretofore given and made in the said cause be vacated and set aside and declared to be null and void for each of the following causes and reasons:

I.

That the indictment on file herein does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant. [49]

II.

That said indictment improperly includes two offenses without alleging same in separate counts.

III.

That this Court has no jurisdiction to pass judgment upon the defendant by reason of the fact that said indictment on file herein does not state a public offense under the laws of the United States.

WHEREFORE, by reason of the premises the defendant prays this Honorable Court that the judgment herein be arrested and withheld and that the conviction of the defendant be declared null and void.

GUSTAVE JOHNSON,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant, Gustave Johnson.

[Endorsed]: Filed April 28, 1923. Walter B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.

Received Copy, April —, 1923.

GROVE L. FINK,

Asst. U. S. Attorney.

Exception No. 16.

Said motion in arrest of judgment was argued by the attorney for the defendant and was submitted to the Court for its decision and after due consideration, the Court denied the motion in arrest of judgment.

ment and the defendant then and there duly and regularly excepted.

And thereupon, the Court rendered its judgment and sentence upon the defendant and granted to said defendant time in which to lodge and settle his proposed bill of exceptions; said time was granted and was extended by stipulation of the parties and orders of the Court to and including the 27th day of August, 1923.

The said defendant hereby presents the foregoing as his bill of exceptions herein and respectfully asks that the same be [50] allowed, signed and sealed and made a part of the record in this case.

Dated this 22d day of June, 1923.

EDWARD A. O'DEA,
Attorney for Defendant. [51]

In the Southern Division of the United States
District Court, in and for the Northern District
of California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUSTAVE JOHNSON,
Defendant.

Notice of Presentation of Bill of Exceptions.

To John T. Williams, United States Attorney and
Grove L. Fink, Assistant United States Attorney:

You will please take notice that the foregoing constitutes and is the proposed bill of exceptions of the defendant in the above-entitled cause, and the said defendant will apply to the said Court to allow said bill of exceptions and to sign and seal the same as the bill of exceptions herein.

EDWARD A. O'DEA,
Attorney for Defendant. [52]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
GUSTAVE JOHNSON,
Defendant.

Stipulation Re Bill of Exceptions.

It is hereby stipulated and agreed that the foregoing bill of exceptions is correct and that the same may be signed, settled, allowed and sealed by the Court.

Dated this 30 day of July, 1923.

JOHN T. WILLIAMS,
United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant. [53]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUSTAVE JOHNSON,
Defendant.

Order Settling Bill of Exceptions.

This bill of exceptions having been duly presented to the Court within the time allowed by law and the rules of the Court and within the time extended by the Court by orders duly and regularly made, is now signed, sealed and made a part of the records in this case, and is allowed as correct.

- Dated this 31st day of July, 1923.

JOHN S. PARTRIDGE,
United States District Judge.

Service of the within bill of exceptions is hereby admitted this 30th day of July, 1923.

JOHN T. WILLIAMS,
United States Attorney.

[Endorsed]: Filed Jul. 31, 1923. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.
[54]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUSTAVE JOHNSON,

Defendant.

Petition for Writ of Error and Supersedeas.

Now comes Gustave Johnson, defendant herein, by Edward A. O'Dea, Esq., his attorney, and says that on the 28th day of April, 1923, this Court rendered judgment and sentence against the defendant whereby he was adjudged and sentenced to imprisonment to wit: to be imprisoned for a term of three years and six months in the Federal Prison at McNeil's Island, State of Washington; that in the judgment and proceedings had prior thereto in this cause certain errors were permitted to the prejudice of the defendant all of which will more fully appear from the assignment of errors which is filed with this petition.

WHEREFORE, the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Cir-

cuit, for the correction of errors complained of, and that a transcript of the records in this cause, duly authenticated may be sent to the Circuit Court of Appeals aforesaid, and that the defendant be awarded a supersedeas upon said judgment and all necessary and proper process including bail.

G. A. JOHNSON,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant.

Due service of the within petition for writ of error and supersedeas is hereby admitted this 28th day of April, 1923.

UNITED STATES ATTORNEY.

GROVE J. FINK,

Asst. United States Attorney.

[Endorsed]: Filed Apr. 28, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[55]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUSTAVE JOHNSON,

Defendant.

Assignment of Errors.

Gustave Johnson, the plaintiff in error, and Edward A. O'Dea, Esq., his attorney, in connection with his petition for a writ of error makes the following assignment of errors which he alleges occurred upon the trial of said cause:

I.

The Court erred in overruling the demurrer to the indictment interposed by the plaintiff in error, the demurrer specifying particularly (1) That the indictment does not state facts sufficient to constitute an offense against the laws of the United States and particularly against the provisions of the Act of December 17, 1914, as amended February 24, 1919.

(2) That said indictment is uncertain in that it cannot be ascertained therefrom how defendants were persons required to register and pay a tax under the provisions of the Act of December 17, 1914 as amended February 24, 1919.

(3) That said indictment is uncertain because it cannot be ascertained therefrom whether the defendants are charged as being dealers in narcotics and required to register or whether they obtained the narcotics above mentioned from a registered dealer in pursuance of a prescription written for the legitimate medical use of defendants.

(4) That the said indictment is uncertain in that it cannot be ascertained therefrom why the defendants, or either [56] of them, were persons

required to pay the special tax provided for by the aforesaid Act on the said morphine.

(5) That said indictment is uncertain in that it cannot be ascertained therefrom whether the defendants had joint possession of the narcotics mentioned in the indictment or whether one defendant has possession of one can or morphine and the other defendant had possession of the finger-stall containing the morphine mentioned in said indictment.

(6) That said indictment is uncertain in that it cannot be ascertained therefrom whether the defendants, or either of them, are charged with possessing the narcotics mentioned in said indictment at the same time.

(7) That said indictment is uncertain in that it cannot be ascertained therefrom whether the Government charges one offense against the defendants or whether the Government is attempting to charge the defendants with two offenses in one count.

(8) That said indictment is uncertain in that it cannot be ascertained therefrom what connection, if any, the defendants had with each other, whether one was the agent of the other, or whether each was acting independent of the other, or whether they were acting under a partnership agreement.

To which ruling overruling said demurrer, the plaintiff in error, duly excepted.

II.

The Court erred in overruling the objection of plaintiff in error to the admission of evidence of a

certain quantity of morphine, said objection being based upon the ground that said morphine was seized as a result of a search of the plaintiff in error's home and a seizure therefrom of a quantity of morphine without any search-warrant, without authority of law, and in violation of the Constitutional rights guaranteed defendant under the Federal and State Constitutions to which rulings the plaintiff in error duly excepted. [57]

III.

The Court erred in denying the motions of the plaintiff in error to exclude from evidence the can of morphine and other evidence seized from the home of the plaintiff in error without a search-warrant, without any authority of law, in violation of plaintiff in error's Constitutional rights; said motion was made at the time of the introduction of said evidence and at the conclusion of all the evidence in the case. To which rulings the plaintiff in error duly excepted.

IV.

The Court erred in overruling the plaintiff in error's objection to the question asked plaintiff in error by the Government: "Do you remember what time in 1908 you had that operation?" "As a matter of fact, were you not in Los Angeles in May of 1908?" "Mr. Johnson, I just want you to use the best recollection you can; I know that is all you can do, and state to me just exactly what month, as near as you can remember it, you had the operation. I think it is important." "Well, now, for the purpose of refreshing your recollection, and that

only, do you know where you were from May until November, in the year 1908?"

To which rulings, the plaintiff in error duly excepted.

V.

The Court erred in denying the motion of plaintiff in error for a directed verdict of Not Guilty upon the ground that the evidence is insufficient to convict the defendant.

To which ruling, the plaintiff in error duly excepted.

VI.

The Court erred in denying the motion of plaintiff in error for a directed verdict of Not Guilty upon the ground that the indictment did not state any public offense.

To which ruling, the plaintiff in error duly excepted.

VII.

The Court erred in denying the motion of plaintiff in [58] error for a directed verdict of not guilty upon the ground that the evidence was insufficient to substantiate the charge that the defendant possessed a finger-stall of morphine.

To which ruling, the plaintiff in error duly excepted.

VIII.

The Court erred in refusing to give the following instruction requested by plaintiff in error:

"You are instructed that if you find from the evidence that the defendant, Gustave Johnson, was merely a consumer, a user, or an addict to the use

of narcotics and had the narcotics mentioned in the indictment in his possession for his own use and did not import, manufacture, produce, compound, sell, deal in, dispense or give away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, then he was a person not required to register under the provisions of the Act and you must return a verdict of "not guilty."

To the Court's refusal to give such instruction, plaintiff in error duly excepted.

IX.

The Court erred in refusing to give the following instruction requested by plaintiff in error:

"You are instructed that there is no presumption of law created in the Act of December 17, 1914, as amended February 24, 1919, which is superior to or overcomes the presumption of innocence with which the defendant is clothed from the time of his arrest to the end of the jury's deliberations.

To the Court's refusal to give such instruction, plaintiff in error duly excepted.

X.

The Court erred in refusing to give the following instruction requested by plaintiff in error:

"It is not necessary under any law for the defendant to prove his innocence but the burden rests upon the prosecution to establish every element of the crime with which he is charged [59] and every element of the crime must be established to a moral certainty and beyond all reasonable doubt. If the prosecution failed to establish to a moral certainty that the defendant was a person

required to register and did not register under the provisions of the Act for the possession of the narcotics mentioned in the indictment then it is your duty to acquit the defendant. If the prosecution failed to establish to a moral certainty and beyond all reasonable doubt that the defendant had not paid the tax required for the possession of said narcotics then it is your duty to acquit the defendant."

To the Court's refusal to give such instruction, plaintiff in error duly excepted.

XI.

The Court erred in denying the motion for new trial on behalf of defendant, in this

- (1) That the verdict in said cause is contrary to law.
- (2) That the verdict in said cause was not supported by the evidence in the case.
- (3) That the evidence in said cause is insufficient to justify said verdict.
- (4) That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial which errors were duly excepted to.
- (5) That the Court improperly instructed the jury to defendant's prejudice.

To which ruling, the plaintiff in error duly excepted.

XII.

The Court erred in denying the motion in arrest of judgment on behalf of the plaintiff in error, in this

1. That the information on file does not charge or state facts sufficient to constitute a public offense under the Laws of the United States against this defendant.
2. That said indictment improperly includes two offenses without alleging same in separate counts. [60]
3. That this Court has no jurisdiction to pass judgment upon the defendant by reason of the fact that said indictment on file herein does not state a public offense under the laws of the United States.

To which ruling, the plaintiff in error duly excepted.

G. A. JOHNSON,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant.

Due service of the within assignment of errors is hereby admitted this 28th day of April, 1923.

UNITED STATES ATTORNEY.

GROVE J. FINK,

Asst. United States Attorney.

[Endorsed]: Filed Apr. 28, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[61]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

No. 13,169.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
GUSTAVE JOHNSON,
Defendant.

Order Allowing Writ of Error and Supersedeas.

The writ of error and the supersedeas herein
prayed for by Gustave Johnson, plaintiff in error,
pending the decision upon said writ of error, is
hereby allowed and the defendant is admitted to
bail upon the writ of error in the sum of Five Thou-
sand and No/100 (\$5,000.00) Dollars.

The bond for costs of the writ of error is hereby
fixed at the sum of \$250.00 for defendant.

Dated at San Francisco, California, this 28th
day of April, 1923.

JOHN S. PARTRIDGE,
United States District Judge.

Due service of the within order allowing writ of
error and supersedeas is hereby admitted this 28th
day of April, 1923.

United States Attorney.
GROVE J. FINK,
Asst. United States Attorney.

[Endorsed]: Filed Apr. 28, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [62].

Bond on Writ of Error.

#13,169.

United States of America.

Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS, that we Gustave Johnson as principal and National Surety Company and ————— as sureties, are held and firmly bound unto the *the* United States of America, in the sum of Five Thousand (\$5,000.-00) Dollars, to be paid to the said United States of America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated the 28th day of April, in the year of our Lord, one thousand nine hundred and twenty-three:

THE CONDITION of the above recognizance is such, that, whereas, an indictment has been found by the United States Grand Jury for the Southern Division of the Northern District of California, and filed on the 27th day of March, A. D. 1923, in the Southern Division of the United States District Court for the Northern District of California, charging the said Gustave Johnson with Violation Act December 17, 1914 as amended (Harrison

Narcotic Act) committed on or about the 23d day of March, A. D. 1923, to wit: at the District and Division aforesaid; thereafter judgment and sentence was rendered made and entered and petition for writ of error granted;

AND WHEREAS, the said Gustave Johnson has been required to give a recognizance, with sureties, in the sum of Five Thousand (\$5,000.00) Dollars for his appearance before said United States District Court whenever required, and pending determination of writ of error;

NOW, THEREFORE, If the said Gustave Johnson shall personally appear at the United States Circuit Court of Appeals for the Ninth Judicial Court and Southern Division of the United States District Court for the Northern District of California, First Division, to be holden at the court-rooms of said Courts in the city and county [63] of San Francisco, on the 2—— day of when required, A. D. 192— at ten o'clock in the forenoon of that day, and afterwards whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Courts without leave first obtained, and if he shall appear for judgment and render himself in execution thereof, then this recognizance

shall be void, otherwise, to remain in full effect and virtue.

G. A. JOHNSON. (Seal)

Address #1233 Pease Place, Alameda, California.

NATIONAL SURETY COMPANY, (Seal)

C. T. Hughes, (Seal)

By C. T. Hughes,

Its Attorney in fact.

Acknowledged before me the day and year first above written.

LYLE S. MORRIS, (Seal)

Deputy Clerk, U. S. District Court, Northern District of California.

Name and Address of Attorney for Defendant:

EDWARD O'DEA,

Address Phelan Building, S. F., Calif.

Approved: JOHN S. PARTRIDGE,
Judge U. S. District Court.

Approved as to form:

GROVE J. FINK,

Asst. U. S. Atty.

[Endorsed]: Filed Apr. 28, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[64]

Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That We, Gustave Johnson as principal, and National Surety Company, as sureties, are held firmly bound unto United States of America in the full and just sum of Two Hundred and Fifty (\$250.00) Dollars, to be paid to the said United States of

America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of April in the year of our Lord One Thousand, Nine Hundred and Twenty-three.

WHEREAS, lately at a District Court of the United States for the Southern Division Northern District of California, First Division, cause #13,169 in a suit depending in said Court, between United States of America against Gustave Johnson, et al., defendants, a judgment was rendered against the said Gustave Johnson and the said Gustave Johnson having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Gustave Johnson shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

G. A. JOHNSON. (Seal)

NATIONAL SURETY COMPANY. (Seal)

C. T. Hughes, (Seal)

By C. T. Hughes, (Seal)

Its Attorney in Fact.

Acknowledged before me the day and year first above written.

[Seal] LYLE S. MORRIS,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Apr. 28, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[65]

4/28/23 Approved as to form.

GROVE J. FINK,
Asst. U. S. Attorney.

4/28/23 Bond approved.

JOHN S. PARTRIDGE,
Judge U. S. District Court. [66]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 66 pages numbered from 1 to 66, inclusive, contains a full, true and correct transcript of certain records and proceedings, in the case of the United States of America vs. Gustave Johnson, No. 13,169, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein), and the instructions of the Attorney for Defendant and Plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of **Twenty-Four Dollars and Twenty-five**

Cents (\$24.25) and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error (page 68), return to writ of error (page 69) and original citation on writ of error (page 70).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of August, A. D. 1923.

[Seal]

WALTER B. MALING,
Clerk.

By C. M. Taylor,
Deputy Clerk. [67]

Writ of Error (Original).

United States of America,—ss.

The President of the United States of America,
To the Honorable, the Judges of the District
Court of the United States for the Northern
District of California. GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Gustave Johnson, plaintiff in error and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Gustave Johnson, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 2d day of August, in the year of our Lord one thousand nine hundred and twenty-three.

WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By C. W. Calbreath,
Deputy Clerk.

Allowed by

JOHN S. PARTRIDGE,
Judge.

Receipt of a copy of the within writ of error is admitted this 2d day of August, 1923.

JOHN T. WILLIAMS,
U. S. Attorney.

T. J. SHERIDAN,
Asst. U. S. Attorney.

[Endorsed]: No. 13,169. United States District Court for the Northern District of California. Gustave Johnson, Plaintiff in Error, vs. United States of America, Defendant in Error. (Original.) Writ of Error. Filed Aug. 2, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [68]

Return to Writ of Error.

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mentioned is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 13th day of August, A. D., 1923, duly lodged in the case in this Court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,
Clerk, United States District Court Northern District of California.

By C. M. Taylor,
Deputy Clerk. [69]

Citation on Writ of Error (Original).

United States of America,—ss.

The President of the United States, to the United States of America, and to John T. Williams, Esq., United States Attorney, and to Grove J. Fink, Esq. and Thomas J. Sheridan, Esq., assistants to the United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Gustave Johnson is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PART-
RIDGE, United States District Judge for the
Northern District of California this 2d day of
August, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: No. 13,169. United States District Court for the Northern District of California. Gustave Johnson, Plaintiff in Error, vs. United States of America, Defendant in Error. (Original.) Citation on Writ of Error. Filed Aug. 2, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Receipt of a copy of the within citation on writ of error is hereby admitted this 2d day of August, 1923.

JOHN T. WILLIAMS,
S.

U. S. Attorney. [70]

[Endorsed]: No. 4077. United States Circuit Court of Appeals for the Ninth Circuit. Gustave Johnson, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed August 14, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUSTAVE JOHNSON,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD A. O'DEA,

Attorney for Plaintiff in Error.

No. 4077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUSTAVE JOHNSON,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

The plaintiff in error is accused by indictment wherein it is charged that on or about the 23rd day of March, 1923, at the City and County of San Francisco, in the Southern Division of the Northern District of California, he and Ray Croxall

“then and there being, did then and there violate a requirement of the Act of December 17, 1914, as amended February 24, 1919, in that they did knowingly, wilfully, unlawfully, and feloniously have in their possession a certain preparation and derivative of opium, to-wit, one can morphine and one finger stall containing approximately a total of 194 grains of

morphine, said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act, and not then and there having paid the special tax provided for by the aforesaid Act on the said morphine. Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided." (Trans. Rec. pages 3 and 4.)

The indictment was presented and filed on the 27th day of March, 1923. To the indictment, the plaintiff in error interposed a demurrer (Trans. Rec. pages 7, 8 and 9), which said demurrer was ordered overruled by the Court. (Trans. Rec. pages 9 and 10.) The plaintiff in error pleaded not guilty to the indictment (Trans. Rec. page 6) and the defendant, Ray Croxall, pleaded guilty to said indictment.

On the 20th day of April, 1923, the plaintiff in error was tried before a jury and the jury returned a verdict on said day finding the plaintiff in error guilty of the charge set forth in the indictment. Said verdict was as follows:

"We, the jury, find as to the defendant at the bar as follows: Gustave Johnson, guilty, as charged." (Trans. Rec. page 15.)

Thereafter, on the 28th day of April, 1923, plaintiff in error interposed a motion for a new trial;

also a motion in arrest of judgment, each of which were by the Court denied. (Trans. Rec. pages 16, 17, 18, 19 and 20.) Whereupon the Court sentenced the plaintiff in error to three (3) years and six (6) months imprisonment in the United States Penitentiary at McNeil Island, State of Washington, and the defendant, Croxall, was sentenced to six (6) months imprisonment in the County Jail, County of San Francisco, State of California. (Trans. Rec. page 20.) A writ of error was thereupon sued out by the defendant to review the judgment and proceedings of the trial Court.

II.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

1. The Court erred in overruling the demurrer to the indictment interposed by the plaintiff in error, the demurrer specifying particularly,

(a) That the indictment does not state facts sufficient to constitute an offensive against the laws of the United States and particularly against the provisions of the Act of December 17, 1914, as amended February 24, 1919.

(b) That said indictment is uncertain in that it can not be ascertained therefrom how defendants were persons required to register and pay a tax under the provisions of the Act of December 17, 1914, as amended February 24, 1919.

(c) That said indictment is uncertain because it can not be ascertained therefrom whether the defendants are charged as being dealers in narcotics and required to register or whether they obtained the narcotics above mentioned from a registered dealer in pursuance of a prescription written for the legitimate medical use of defendants.

(d) That the said indictment is uncertain in that it can not be ascertained therefrom why the defendants, or either of them, were persons required to pay the special tax provided for by the aforesaid Act on the said morphine.

(e) That said indictment is uncertain in that it can not be ascertained therefrom whether the defendants had joint possession of the narcotics mentioned in the indictment or whether one defendant had possession of one can of morphine and the other defendant had possession of the finger stall containing the morphine mentioned in said indictment.

(f) That said indictment is uncertain in that it can not be ascertained therefrom whether the defendants, or either of them, are charged with possessing the narcotics mentioned in said indictment at the same time.

(g) That said indictment is uncertain in that it can not be ascertained therefrom whether the Government charges one offense against the defendants or whether the Government is attempting to charge the defendants with two offenses in one count.

(h) That said indictment is uncertain in that it can not be ascertained therefrom what connection, if any, the defendants had with each other, whether one was the agent of the other, or whether each was acting independent of the other, or whether they were acting under a partnership agreement.

To which ruling overruling said demurrer, the plaintiff in error, duly excepted.

2. The Court erred in denying the motion of plaintiff in error for a directed verdict of not guilty upon the ground that the evidence is insufficient to convict the defendant. To which ruling, the plaintiff in error duly excepted.

3. The Court erred in denying the motion of plaintiff in error for a directed verdict of not guilty upon the ground that the indictment did not state any public offense. To which ruling, the plaintiff in error duly excepted.

4. The Court erred in denying the motion of plaintiff in error for a directed verdict of not guilty upon the ground that the evidence was insufficient to substantiate the charge that the defendant possessed a finger stall of morphine. To which ruling, the plaintiff in error duly excepted.

5. The Court erred in refusing to give the following instruction requested by plaintiff in error:

"You are instructed that if you find from the evidence that the defendant, Gustave Johnson, was merely a consumer, a user, or an addict to the use of narcotics and had the narcotics men-

tioned in the indictment in his possession for his own use, and did not import, manufacture, produce, compound, sell, deal in, dispense or give away opium, or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, then he was a person not required to register under the provisions of the Act and you must return a verdict of 'Not Guilty'."

To the Court's refusal to give such instruction, plaintiff in error duly excepted.

6. The Court erred in refusing to give the following instruction requested by plaintiff in error:

"You are instructed that there is no presumption of law created in the Act of December 17, 1914, as amended February 24, 1919, which is superior to or overcomes the presumption of innocence with which the defendant is clothed from the time of his arrest to the end of the jury's deliberations."

To the Court's refusal to give such instruction, plaintiff in error duly excepted.

7. The Court erred in refusing to give the following instruction requested by the plaintiff in error:

"It is not necessary under any law for the defendant to prove his innocence but the burden rests upon the prosecution to establish every element of the crime with which he is charged and every element of the crime must be established to a moral certainty and beyond all reasonable doubt. If the prosecution failed to establish to a moral certainty that the de-

fendant was a person required to register and did not register under the provisions of the Act for the possession of the narcotics mentioned in the indictment, then it is your duty to acquit the defendant. If the prosecution failed to establish to a moral certainty and beyond all reasonable doubt that the defendant had not paid the tax required for the possession of the said narcotics, then it is your duty to acquit the defendant.”

To the Court’s refusal to give such instruction, plaintiff in error duly excepted.

8. The Court erred in denying the motion in arrest of judgment on behalf of the plaintiff in error, in this,

(a) That the information on file does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

(b) That said indictment improperly includes two offenses without alleging same in separate counts.

(c) That this Court has no jurisdiction to pass judgment upon the defendant by reason of the fact that said indictment on file herein does not state a public offense under the laws of the United States.

To which ruling, the plaintiff in error duly excepted.

III.

ARGUMENT.

1.

NO CRIME IS SET FORTH IN THE INDICTMENT.

The indictment does not state facts sufficient in law to constitute a crime or public offense against the United States. This point is raised by the demurrer interposed by the plaintiff in error on file in the cause, which was ordered overruled and to which an assignment of error was duly made. (Trans. Rec. pages 65 and 66.) It is raised by plaintiff in error's request for binding instructions or motion for a directed verdict of not guilty made at the conclusion of the taking of testimony in the cause, to which an assignment of error was duly made. (Trans. Rec. pages 50 and 68.) It was also made by plaintiff in error before judgment by his motion in arrest of judgment, to which an assignment of error was also made. (Trans. Rec. pages 70 and 71.)

The indictment contains but one count which alleges that,

"Gustave Johnson and Roy Croxall, hereinafter called the defendants, heretofore, to-wit, on or about March 23, 1923, at the City and County of San Francisco, and within the Southern Division of the Northern District of California, then and there being did then and there violate a requirement of the Act of December 17, 1914, as amended February 24, 1919, in that they did knowingly, wilfully, unlawfully and

feloniously have in their possession a certain preparation and derivative of opium, to-wit: one can morphine and one finger stall containing approximately a total of 194 grains of morphine said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act, and not then and there having paid the special tax provided for by the aforesaid Act on the said morphine. Against the peace and dignity of the United States of America, and contrary to the form of the Statute of the said United States of America in such case made and provided."

The indictment is defective for the reason that it fails to show that plaintiff in error is one of the class required by Section I of the Act above specified to register and pay a tax. The first clause of Section I of the Act of Congress of February 24, 1919, as also the Act of December 17, 1914, is, as follows:

"That on or before July 1st of each year, every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the Collector of Internal Revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided;"

Barnes' Fed. Code (Suppl. 1921), p. 174;

Barnes' Fed. Code (1919), pp. 1328, etc.;

Sec. ~~122~~ *U. S. Statutes at Large*, p. 785.

Section 8 of the Act of December 17, 1914, provides:

“That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section and also of a violation of the provisions of this Act.”

Certain exceptions are therein made and section continues, as follows:

“provided further, that it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant.”

Sec. 8. 38 U. S. *Statutes at Large*, pp. 785-790;

Barnes' Fed. Code (1919), pp. 1328-1332.

Section 9 of the Act of December 17, 1914, prescribes the penalty:

“That any person who violates or fails to comply with any of the requirements of this Act shall, on conviction, be fined not more than \$2,000 or be imprisoned not more than five years, or both, in the discretion of the Court.”

Sec. 9. 38 U. S. *Statutes at Large*, pp. 785-790;

Barnes' Fed. Code (1919), pp. 1328-1332.

Section I of the Act of December 17, 1914, is designated as Section 5452 of Barnes' Federal Code; Section 8 as 5459 and Section 9 as 5460. The Act of February 24, 1919, amended Sections 5452 and 5457 as set forth in said Code, which are Sections 1 and 6 of 38 U. S. Statutes at Large, but left Sections 5459 and 5460 undisturbed.. In other words, Sections 8 and 9 of the "Harrison Anti-Narcotic Act" as amended are the original sections of the Act of December 17, 1914. There are additional requirements in Section I of the Act as amended, new crimes set forth, for which the same penalty set forth in Section 9 of the Act of December 17, 1914, is prescribed, but in other respects Section I in the Act as amended is not materially different from the original Act.

The indictment does not allege that the defendant is an importer, manufacturer, producer, compounder, seller, dealer in, dispenser or a giver away of opium or coca leaves or any compound, manufacture, salt, derivative or preparation thereof, *but indulges in the bald conclusion of law that he is a person required to register and pay a tax.*

It has been held that Section 8 of the original "Harrison Anti-Narcotic Act" applies only to those persons specified in the first clause of the first section of said Act and it has also been held that

Section 8 of the Act as amended applies only to the same class.

United States v. Jin Fuey Moy, 241 U. S. 394 to 402;

Pendleton v. United States, 290 Fed. 388, 389;

United States v. Wilson, 225 Fed. 82 to 84;

United States v. Woods, 224 Fed. 278 to 280.

“It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that the District Court in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure was right.”

“Approaching the issue from this point of view we conclude that ‘any person not registered’ in Section 8 can not be taken to mean any person in the United States, but must be taken to refer to the class with which the statute undertakes to deal, the persons who are required to register by Section I.”

U. S. v. Jin Fuey Moy, 241 U. S. at page 402.

“The one (the count referred to) upon which he was convicted in substance alleged that, while he was a practicing physician and a person required to register under the ‘Harrison Anti-Narcotic Act’ (Comp. St. Secs. 6287-g-6287-q) he had in his possession 2.31 grains of morphine, although he had never registered. Quite clearly, this count charged no offense. It did not attempt to set up any violations of Sections 1006 et. seq. of the Revenue Act of February 24, 1919, 40 Stat. 1130 (Comp. St. Ann. Supp. 1919, 6287 g). It was obviously drawn under the original Anti-Narcotic Act (38 Stat. 785) which

the Supreme Court years ago held did not penalize the mere possession of narcotics. U. S. v. Jin Fuy Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917 D. 854. The court gains no added strength from the allegation that the defendant was a practicing physician. As such he was not required to register unless he dispensed narcotics."

Pendleton v. U. S., 290 Fed. 388;

Advance Sheets Vol. 290 Fed. No. 2, p. 388,
September 20, 1923.

According to these authorities, plaintiff in error is not within the provisions of Section 8 of the Act because he was merely in possession of the narcotics and had not registered and paid the special tax, by adding the conclusion of law that he was required to register. The Sixth Amendment to the United States Constitution provides

"In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and the cause of the accusation."

To say that he was a person required to register did not inform him of the nature of the cause of the accusation.

Plaintiff in error demanded additional information upon the subject under discussion in subdivisions 2, 3 and 4 of his demurrer (Trans. Rec. pages 7 and 8, 65 and 66), which were:

2. "That said indictment is uncertain in that it can not be ascertained therefrom how defendants were persons required to register and pay

a tax under the provisions of the Act of December 17, 1914, as amended February 24, 1919.”

3. “That said indictment is uncertain because it can not be ascertained therefrom whether the defendants are charged as being dealers in narcotics and required to register or whether they obtained the narcotics above mentioned from a registered dealer in pursuance of a prescription written for the legitimate medical use of defendants.”

4. “That the said indictment is uncertain in that it can not be ascertained therefrom why the defendants, or either of them, were persons required to pay the special tax provided for by the aforesaid Act on the said morphine.”

Plaintiff in error was entitled to know from the indictment whether he was accused as an importer, manufacturer, producer, compounder, seller, dealer in, dispenser or giver away of the narcotics mentioned in the indictment in order to prepare his defense and to save him from possible double jeopardy. This information was denied the defendant and we respectfully submit that the lower Court erred in so doing.

The indictment should have particularly designated, when the plaintiff in error demanded it, to which one of the class of those required to register, he belonged. The conclusion of law that he was a person required to register is too vague and uncertain and as such it is insufficient.

“Offenses created by statute as well as offenses at common law, must be accurately and clearly described in an indictment; and if the

offense can not be so described with out expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent, as it is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the offense is composed so as to bring the accused within the true intent and meaning of the statute defining the offense."

U.S. v. Cruikshank, 92 U. S. pp. 542 to 569,
23 Law Ed., p. 595.

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute unless those words are in themselves fully, directly and expressly without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question read in the light of the common law and of other statutes on the like matter enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

U. S. v. Carll, 105 U. S. 611.

"The settled rules governing here are that a crime should not be charged by way of inference but directly, the indictment should set forth accurately every ingredient of which the offense is composed; if the crime is made up of acts of intent they must be set forth with reasonable particularity, as to the time and place, the accused should be informed by that indictment as to the precise nature of the charge set forth

against him to enable the court to say as to whether the facts set forth are sufficient in law to support a conviction, and the test is whether the indictment contains every element of the offense and sufficiently informs the defendant of what he must meet, and also whether it will enable him to sustain a plea of former acquittal or conviction."

U. S. v. Dowling, 278 Fed. 633.

The Government must content itself with the charge set forth in the indictment which is directed at the possession of drugs under certain circumstances. It can not inferentially or by intendment include in the charge other violations of the Act, as suggested by counsel for the Government in his argument before the District Court, without distinctly charging the defendant with those violations, with a view that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense.

As Section I of the "Harrison Anti-Narcotic Act", as amended, sets forth many requirements for violations of which many offenses are created, to convict or acquit the defendant of a violation of Section 8 of said Act by referring to other crimes by way of inference or intendment from the mere possession of said drugs would not preclude the Government from prosecuting him for those other offenses at a subsequent date. *He could not successfully urge a plea of once in jeopardy to the charge*

of "purchasing, selling, dispensing or distributing any of the drugs set forth in the indictment, which were not in the original stamped package or from the original stamped package", neither could he interpose such a plea if indicted subsequently for the offense of "being a person required to register under the provisions of the Act and having imported, manufactured, produced, compounded, sold, dealt in, dispensed, distributed, administered or given away any of the aforesaid drugs, without having registered and paid the special tax as provided by the Act." These violations constitute separate crimes in themselves, upon which separate indictments could be predicated. Manifestly therefore, the defendant was entitled to know upon his demand for information raised by his demurrer whether he was charged with a crime at all or the exact offense with which he was charged, so that upon his conviction or acquittal the Government would be stopped from ever trying him for that transaction again. To this effect are the following authorities:

- U. S. v. Hess*, 124 U. S. 483;
- U. S. v. Carll*, 105 U. S. 611 (supra);
- U. S. v. Simmons*, 96 U. S. 360;
- U. S. v. Cruikshank*, 92 U. S. 542 (supra);
- Pierre v. U. S.*, 275 Fed. 352;
- U. S. v. Dowling*, 278 Fed. 633 (supra);
- U. S. v. Robinson*, 266 Fed. 240.

In the case of *U. S. v. Simmons*, 96 U. S., on page 362, the learned Justice had this to say:

“Where an offense is purely statutory, having no relation to the common law, it is as a general rule sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute. But to this general rule there is the qualification fundamental in the law of criminal procedure that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution.”

At a much later date, the Circuit Court of Appeals of the Eighth Circuit, in the case of *Pierre v. U. S.*, 275 Fed. page 352 et seq., held:

“An indictment to which the defendant is required to plead must set forth facts so distinctly as to enable the defendant to plead a former conviction or acquittal, if again indicted for the same offense, and upon such a plea that fact must appear from the face of the indictment (*U. S. v. Hess*, 124 U. S. 483). This indictment is defective in that respect. It fails to charge that the alleged threats were made to or in the presence of any person. If the defendant should again be indicted and the indictment charged to whom, or in the presence of what person or persons, the alleged threats were made, by the defendant, a plea of former acquittal or conviction, under this indictment, could not be sustained.”

It follows, therefore, that upon the authority of the rulings in the cases of *Jin Fucy Moy*, 241 U. S. 394; *Pendleton v. U. S.*, 290 Fed. 388; *U. S. v. Wilson*, 225 Fed. 82; *U. S. v. Woods*, 224 Fed. 288, that the indictment against the plaintiff in error charges no crime at all and from the rulings in *U. S. v. Hess*, 124 U. S. 483; *U. S. v. Carll*, 105 U. S. 611; *U. S. v. Simmons*, 96 U. S. 360; *Bowling v. U. S.*, 278 Fed. 633, and the other cases cited, that the plaintiff in error can not be charged with other offenses by inference or intendment, when such offenses are not pleaded with such precision as to inform the plaintiff in error of the nature of the charge against him so that he may be protected in his rights; and the lower Court committed reversible error in overruling his demurrer, in denying his motion for a directed verdict, in denying his motion in arrest of judgment and in sentencing him to prison.

2.

THERE ARE TWO DISTINCT OFFENSES AGAINST TWO DISTINCT PERSONS IMPROPERLY JOINED IN AN INDICTMENT WHICH CONSISTS OF ONE COUNT.

The indictment improperly charges two distinct offenses against two distinct persons in one count. This point is raised by the demurrer interposed by the plaintiff in error which demurrer was ordered overruled and to which an assignment of error was duly made. (Trans. Rec. pages 65, 66.) And it

was also raised by plaintiff in error before judgment by his motion in arrest of judgment, to which an assignment of error was also made. (Trans. Rec. pages 70, 71.)

The indictment charges plaintiff in error and the defendant, Roy Croxall, on the date set forth therein, with knowingly, unlawfully and feloniously having in their possession a certain preparation and derivative of opium, to-wit, one can morphine and one finger stall containing approximately a total of 194 grains of morphine. To the indictment upon this point, plaintiff in error demurred and specified as his grounds of demurrer the following:

5. "That said indictment is uncertain in that it can not be ascertained therefrom whether the defendants had joint possession of the narcotics mentioned in the indictment or whether one defendant had possession of one can of morphine and the other defendant had possession of the finger stall containing the morphine mentioned in said indictment."

6. "That said indictment is uncertain in that it can not be ascertained therefrom whether the defendants, or either of them, are charged with possessing the narcotics mentioned in said indictment at the same time."

7. "That said indictment is uncertain in that it can not be ascertained therefrom whether the Government charges one offense against the defendants or whether the Government is attempting to charge the defendants with two offenses in one count."

8. "That said indictment is uncertain in that it can not be ascertained therefrom what con-

nection, if any, the defendants had with each other, whether one was the agent of the other, or whether each was acting independent of the other, or whether they were acting under a partnership agreement.”

(Trans. Rec. pages 8, 66.)

The lower Court overruled said demurrer. (Trans. Rec. page 10.) Upon the trial of the cause no connection was established between the plaintiff in error and the possession of the finger stall containing morphine, and the lower Court properly sustained the objection of the plaintiff in error to the introduction in evidence of the finger stall containing morphine, upon the ground that no connection had been shown between the plaintiff in error and the finger stall (Bill of Exceptions, Trans. Rec. page 37), nevertheless, the lower Court permitted the jury to return the following verdict:

“We, the jury, find as to the defendant at the bar as follows: Gustave Johnson, guilty as charged” (Trans. Rec. page 15),

though the point had again been called to the attention of the lower Court upon the conclusion of the Government's case by the motion of plaintiff in error for a directed verdict of not guilty upon the ground that the evidence was insufficient to connect the defendant with the finger stall of morphine. (Bill of Exceptions, Trans. Rec. page 43.)

Section 1024 of the Revised Statutes does not authorize the charging of separate offenses in a

single count of an indictment and by its silence forbids such a course. Said section is as follows:

“When there are several charges against *any person* for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in *separate counts*; and if two or more indictments are found in such cases the Court may order them to be consolidated.”

Sec. 1428, *Barnes' Fed. Code* (1919), page 323.

Plaintiff in error, by his demurrer in virtue of his rights guaranteed him by the Sixth Amendment to the United States Constitution, demanded of the lower Court, whether he was charged with possessing the finger stall containing the morphine, whether he was charged with jointly possessing it with the co-defendant, and whether two offenses were not being set forth in one count; in other words, plaintiff in error did everything legally permissible to avert the result which was brought about by the jury's verdict, to-wit, his conviction of possessing the finger stall containing morphine, which was found on the person of the other defendant and which admittedly plaintiff in error did not possess. We respectfully submit that the lower Court erred in overruling the demurrer of the plaintiff in error and his motion in arrest of judgment.

It has been held that different charges of crime must be stated in different counts and that the joinder of separate offenses, where the parties are not the same and where the offenses are in no wise part of the same transaction, can not be set forth in the same indictment.

U. S. v. McElroy, 164 U. S. 81;

Coco v. U. S., 289 Fed. 33;

U. S. v. Hopkins, 290 Fed. 619;

U. S. v. Deitrich, 126 Fed. 664, 671.

“While the general rule is that counts for several felonies of the same general nature require the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or compel an election, such joinder can not be sustained, where the parties are not the same and where the offenses are in no wise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them.”

U. S. v. McElroy, 164 U. S. 81.

Justice Van Devanter, in the case of *United States v. Deitrich*, 126 Fed. 671, says:

“While the statement of the acts of the defendants in this regard is such as to show that they were several, both offenses are improperly charged in a single count. * * * It seems to us that material inconvenience and embarrassment will properly arise from the trial of the defendants upon this indictment. The general rule that two or more defendants can not be severally charged in the same indictment with dis-

inct and several offenses is well recognized, and under the circumstances recited, the practice to which we have referred, even if here sustained, would not save this indictment from rejection."

And, just lately, it was held in the case of *U. S. v. Hopkins*, 290 Fed. 621:

"The demurrer challenges the indictment on the ground that it is multifarious. I think the objection is well taken. As I understand the law different charges of crime must be stated in different counts. I do not understand, that different offenses, although similar in their nature may be charged in the same count."

Thus, according to the authorities, we respectfully submit that the lower Court erred in trying the plaintiff in error upon an indictment in which the offense of another man committed at a different time and under different circumstances, and which would require a different statement of facts to convict, was linked with the alleged offense against the plaintiff in error, in one count of the indictment, and it is not illogical to assume that the plea of guilty of the defendant, Croxall (Trans. Rec. page 6), to the indictment embarrassed plaintiff in error in his trial before the jury.

3.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE DEFENDANT.

The evidence was insufficient to convict the plaintiff in error and no crime was proven against him. This point is raised by plaintiff in error by his motion for a directed verdict of not guilty on the ground that the evidence was insufficient to substantiate the charge, made at the conclusion of the Government's case and again at the conclusion of all the testimony taken in the case (Bill of Exceptions, Trans. Rec. pages 43, 50), to which assignments of error were made (Trans. Rec. page 68), and said point is duly and regularly before this Court.

In the first place, there is not the slightest evidence that the plaintiff in error is an importer, manufacturer, producer, compounder, seller, dealer in, dispenser or one who gives away the narcotics mentioned in the indictment.

The facts of the case as presented by the evidence are these: On March 23, 1923, the plaintiff in error and Roy Croxall, a co-defendant were arrested on suspicion of theft by Police Officers of the San Francisco Police, and were brought to the Detective Bureau of the Police Department of the City and County of San Francisco for investigation. Two San Francisco police detectives, without the authorization of a search warrant, went to the home of the plaintiff in error and Roy Croxall at 882 Fulton

Street, San Francisco, California, in company with the plaintiff in error and Roy Croxall, who were still under arrest, and proceeded to search the premises for stolen goods. They found nothing in the premises to connect the plaintiff in error and the defendant, Croxall, with the larceny charge, but while in the said premises the police procured a key from the plaintiff in error to his trunk, which plaintiff in error said contained clothes. They obtained the key and opened the trunk. In the top drawer of the trunk, one of the police officers found an ounce can which contained a quantity of morphine. At the time, the plaintiff in error admitted that the can of morphine belonged to him and in another room in the premises, the officers found an empty can, which had once contained morphine, which the plaintiff in error admitted was his, and that he had used it and had bought it up north. The police did not see any revenue stamps on either can. In another room in the house a number of needles were found. In the room occupied by Croxall the plaintiff in error pointed out the place where the needle and syringe could be found. At the time the can of morphine was found the plaintiff in error said he was a user of narcotics and asked the permission of one of the officers to take a "shot" of morphine. Plaintiff in error and the defendant Croxall were taken to the City Prison and booked for violating the State Poison Law.

The police afterwards turned the evidence over to the Government. When the defendant, Croxall was searched, at the City Prison, the finger stall of morphine was found on him. No connection was shown between the plaintiff in error and the possession of the finger stall of morphine found on Croxall, and the Court properly sustained an objection made by plaintiff in error to the introduction in evidence of the finger stall of morphine. (Bill of Exceptions, Trans. Rec. page 37.) *Upon the witness stand, both police officers admitted that they had no information that the plaintiff in error was engaged in the traffic of narcotics* (Bill of Exceptions, Trans. Rec. pages 30, 33, 41, 42), and there was no other evidence offered by the Government that he imported, manufactured, produced, compounded, sold, dealt in, dispensed or gave away the narcotics mentioned in the indictment. At the conclusion of the Government's case, plaintiff in error moved the Court for a directed verdict of not guilty, upon the ground that the evidence was insufficient to convict the defendant. The lower Court denied said motion.

We respectfully submit, that the lower Court erred in denying this motion. The testimony of the police officers (cited *supra*) that they had no information that plaintiff in error was engaged in the traffic of narcotics nullified any effect which might be given to the questionable presumption set forth in Section 8 of the Act of December 17, 1914, and the evidence

adduced by the Government was not sufficient to constitute a crime.

U. S. v. Jin Fuey Moy, 241 U. S. 394;

Pendleton v. U. S., 290 Fed. 388, 389;

U. S. v. Wilson, 225 Fed. 82, 84;

U. S. v. Woods, 224 Fed. 278, 280.

Upon the denial of the motion above mentioned, the plaintiff in error took the witness stand and testified that he was addicted to the use of narcotics and had been so addicted since the year 1908; *that he had the narcotics which were found in his home at 882 Fulton Street, San Francisco, California, in his possession for his own use; that he had never imported any narcotics into the country; that he had never manufactured any narcotics; that he had never produced any narcotics; that he had never compounded any narcotics; that he had never sold any narcotics; that he had never dealt in any narcotics; that he had never dispensed any narcotics and that he had never given any narcotics away.* (Bill of Exceptions, Trans. Rec. pages 43, 44, 47, 48.) The Government was not able to disturb his testimony in a single particular, it did not offer any evidence in rebuttal, and it did not show by legal evidence or hearsay anything more than that a can containing a quantity of narcotics was found in his possession at his home, that he was addicted to the use of narcotics and that the can in which the narcotics were found bore no stamps. At the conclusion

of all the testimony, plaintiff in error again moved the Court for a directed verdict of not guilty upon the ground that the evidence was insufficient to convict the defendant and pointed out *that there was no evidence that the defendant was a person required to register because he was not an importer, nor a manufacturer, nor a producer, nor a compounder, nor a seller, nor a dealer in, nor a dispenser, nor one who gives away the narcotics found in his possession and set forth in the indictment* and particularly called the lower Court's attention to the case of *Jin Fuey Moy*, 241 U. S. 394. But the lower Court denied said motion and we believe therein committed reversible error.

It has been held that Section 8 of the Act of December 17, 1914, which has not been altered by any subsequent act of Congress, does not apply to any person in the United States, but must be taken to refer to the class with which the statute undertakes to deal,—the persons who are required to register by Section I, namely, any person who imports, manufactures, produces, compounds, sells, deals in, dispenses or gives away opium or coca leaves, their compounds, manufactures, salts, derivatives or preparations.

U. S. v. Jin Fuey Moy, 241 U. S. 394;

Pendleton v. U. S., 290 Fed. 388, 389;

U. S. v. Wilson, 225 Fed. 82, 84;

U. S. v. Woods, 224 Fed. 278, 280.

The four cases last cited bear directly upon the point involved. In analyzing them it should be borne in mind that they are directed particularly to Section 8, of the Act of December 17, 1914, under which the instant indictment was drawn, though it is true that the indictment charges plaintiff in error with violating the Act of December 17, 1914, as amended February 24, 1919, but the Act of February 24, 1919, does not touch Section 8 at all. *U. S. v. Jin Fuey Moy*, 241 U. S. 394, is unequivocal in its condemnation of prosecutions, such as this. *Pendleton v. U. S.*, 290 Fed. 388, 389, says that an indictment, such as the one under consideration, charges no offense, having been obviously drawn under the original Anti-Narcotic Act, which the Supreme Court held did not penalize the mere possession of drugs. *U. S. v. Woods*, 224 Fed. 278, and *U. S. v. Wilson*, 225 Fed. 82, discusses the exact points involved here and are as follows:

“Having in mind that taxes can be imposed and statutory offenses created only by direct, clear, and apt language, it seems clear that there is nothing in the Act imposing the duty of registration and payment of taxes upon mere consumers of the drugs. They are not within Section I and Section 8 does not purport to extend the registration and taxation features of the Act to them, or to any one, only to make unlawful mere possession of the drugs by any person of the class of Section I required to register and pay, and who have not, and to create a statutory rule of evidence.”

U. S. v. Woods, 224 Fed. 278, 280.

In the case of *U. S. v. Wilson*, 225 Fed. 82, the facts were,

“that the defendant had at her house, in her possession and under her control, an opium pipe and an outfit necessary for smoking purposes, including a small quantity of opium prepared for the pipe. The defendant testified that she had for several years been an addict to opium smoking, and that the opium was obtained from a Chinaman, and that she had it for her own personal use and consumption. That she never sold, gave away nor dealt in it in form, except to buy it and smoke it. The evidence was uncontradicted and the question arose whether it is an offense under the Act for a person to have in his or her possession any of the drugs named in the Act for her personal use.”

The Court said:

“If it is an offense, Congress has not in turn so declared and it must be worked out by a construction of the language of the Act. It is a criminal statute and must be strictly construed.”

And, further on in the same decision, the Court says:

“The question arises to whom does the clause ‘any person not registered under the provisions of the Act’, and ‘who has not paid the special tax’, in the Eighth Section refer? Clearly it refers to and at least included those things specifically named in the First Section. Does it refer to and include others doing things not specifically named in the Act, having in their

possession or under their control the drugs named for their personal consumption?

"It seems to me that to so hold would be for the Court to enlarge the list of those whom Congress required to register and pay the special tax. To that extent it would be an amendment of the Act. This is not the function of the Court."

If the evidence was as consistent with the defendant's innocence as with his guilt he was entitled to binding instructions and it has been so held in the case of *Weiner v. U. S.*, 282 Fed. 799, wherein the Court says:

"If the evidence is as consistent with the theory that opium was stolen, as it is with the theory that it was not stolen, the motion for binding instructions, for the reasons that the allegations in the indictment had not been proved, should have been granted and the defendants' first point that they could not be convicted under the evidence in the case should be affirmed."

In the present case, the defendant proved that he was not of the class required to register under the provisions of the Act set forth in the indictment. The Government introduced no evidence in rebuttal of the defendant's testimony, no facts in contravention thereof, but contented itself with a questionable rule of evidence set forth in the statute. The theory of the defendant's guilt was inconsistent with the evidence and the defendant whose guilt must be proven beyond a reasonable doubt was convicted

from the mere fact that he had drugs in his possession, which he had satisfactorily explained. Such conviction was unjustified and was erroneous and we respectfully submit that it should be reversed.

There was no proof at all that the plaintiff in error possessed or was in any manner connected with the possession of the finger stall containing the morphine mentioned in the indictment and found on the person of the other defendant, but the verdict did not differentiate upon which possession the conviction was predicated, but found the defendant guilty of everything contained in the indictment. This, too, was erroneous, unjustified in fact for the record unquestionably shows that the possession of the finger stall containing the morphine was a separate and distinct offense, committed by a separate and distinct person, at a different time and which would require different testimony to convict.

This conviction upon the indictment objected to as above set forth in the second subdivision of this argument is condemned by the following authorities, cited heretofore:

U. S. v. McElroy, 164 U. S. 76;

U. S. v. Hopkins, 290 Fed. 619;

Coco v. U. S., 289 Fed. 33;

U. S. v. Deitrich, 126 Fed. 671.

4.

**THERE WAS ERROR COMMITTED IN THE COURT'S REFUSAL
TO GIVE CERTAIN INSTRUCTIONS.**

We respectfully submit that the trial Court erred in refusing to give, at the request of the defendant, the instructions set forth in paragraphs 5, 6, and 7 of specifications of error contained in this brief and contained in plaintiff in error's bill of exceptions (Trans. Rec. pages 55, 56), to which assignments of error were duly made. (Trans. Rec. pages 68, 69, 70.)

The plaintiff in error requested the following instructions:

"You are instructed that if you find from the evidence that the defendant, Gustave Johnson, was merely a consumer, a user, or an addict to the use of narcotics and had the narcotics mentioned in the indictment in his possession for his own use and did not import, manufacture, produce, compound, sell, deal in, dispense or give away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, then he was a person not required to register under the provisions of the Act and you must return a verdict of not guilty."

"You are instructed that there is no presumption of law created in the Act of December 17, 1914, as amended February 24, 1919, which is superior to or overcomes the presumption of innocence with which the defendant is clothed from the time of his arrest to the end of the jury's deliberations."

"It is not necessary under any law for the defendant to prove his innocence but the burden rests upon the prosecution to establish every

element of the crime with which he is charged and every element of the crime must be established to a moral certainty and beyond all reasonable doubt. If the prosecution failed to establish to a moral certainty that the defendant was a person required to register and did not register under the provisions of the Act for the possession of the narcotics mentioned in the indictment then it is your duty to acquit the defendant. If the prosecution failed to establish to a moral certainty and beyond all reasonable doubt that the defendant had not paid the tax required for the possession of said narcotics then it is your duty to acquit the defendant."

These instructions, the Court refused to give and in lieu thereof gave the following:

"The statute under which this indictment is brought makes it a crime for any person to have morphine in his possession, except certain persons who have registered and paid the tax. The statute also provided that the possession of morphine is *prima facie* evidence that he has not registered and has not paid the tax. Therefore, if the Government has established to your satisfaction that the defendant did have this morphine in his possession, then it was incumbent upon the defendant to overcome that *prima facie* showing by proving that he had registered and had paid the tax. He has offered no such evidence in this case, and there is no pretense of any such thing."

"The presumption of innocence which attaches to every person charged with a crime follows at all deliberations and all stages of the case until it is finally determined by the whole twelve of the jury. This defendant, like all defendants, is entitled to that presumption. The Government, in order to overcome that presump-

tion of innocence, must establish the possession of morphine by this defendant beyond a reasonable doubt."

(Trans. Rec. page 54.)

Assuming that the indictment states a public offense, the Government must prove three essential elements which constitute the crime,

(a) They must prove that the defendant was a person required to register and pay a tax;

(b) They must prove that the defendant possessed narcotics;

(c) They must prove that the defendant had not registered and had not paid a tax, for the possession of the narcotics.

We submit that in giving the foregoing instructions and refusing those requested by plaintiff in error that the lower Court refused to place before the jury, for its deliberation, the crux of the crime, that he was a person required to register.

It has been held that if plaintiff in error was not an importer, producer, manufacturer, compounder, seller, dealer in, dispenser or one who gives away the narcotics set forth in the indictment, he was not a person required to register, and was therefore not a person amenable to the provisions of the acts with which the defendant was charged.

U. S. v. Jin Fuey Moy, 241 U. S. 394;

Pendleton v. U. S., 290 Fed. 388, 389;

U. S. v. Wilson, 225 Fed. 82;

U. S. v. Woods, 224 Fed. 278, 280.

And, it has also been held that mere consumers, users, or addicts, as such, who do not import, manufacture, compound, sell, deal in, dispense or give away opium or coca leaves or any of their compounds, manufactures, salts, derivatives or preparations do not have to register and do not have to pay a tax, under Section 8 of the Act of December 17, 1914, or as the Government claims as amended February 24, 1919.

U. S. v. Jin Fung Moy, 241 U. S. 394;

Pendleton v. U. S., 290 Fed. 388, 389;

U. S. v. Wilson, 225 Fed. 82;

U. S. v. Woods, 224 Fed. 278, 280.

It is a settled rule of law that every ingredient of the crime, with which the defendant is charged must be proved to the satisfaction of the jury, beyond a reasonable doubt. And the lower Court in refusing to permit the jury to pass upon the question whether or not the defendant was a person required to register and limiting the province of the jury to determine the guilt or innocence of the defendant upon the mere possession of the narcotics, committed reversible error.

It has been held that where the evidence presents a theory of defense and the court's attention is directed particularly to it, as it was in plaintiff in error's requested instructions referred to above, it is reversible error to refuse to give any charge on such theory.

U. S. v. Bird, 180 U. S. 356;

Calderon v. U. S., 279 Fed. 556;

Hendrey v. U. S., 233 Fed. 5;

Fredericks v. U. S., Unreported 9th Circuit
files 4023.

The Court suppressed evidence in refusing to give plaintiff in error's requested instruction as set forth in his sixth specification of error.

Said instruction is as follows:

"You are instructed that there is no presumption of law created in the Act of December 17, 1914, as amended February 24, 1919, which is superior to or overcomes the presumption of innocence with which the defendant is clothed from the time of his arrest to the end of the jury's deliberations."

And it was held so in substance in

Coffin v. U. S., 156 U. S. 432;

Cochrane & Sayre v. U. S., 157 U. S. 286;

Weiner v. U. S., 282 Fed. 799.

Justice White, in the case of *U. S. v. Coffin*, 156 U. S. 460, says:

"The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a presumptio juris, demonstrates that it is legal evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy." * * * "To say that the one is equivalent of the other (Doctrine of Reasonable Doubt) is therefore to say that legal evidence can be excluded from the jury and that such exclusion may be cured by instructing them correctly in regard to the method

by which they are required to reach their conclusion upon the proof actually before them.”

It has also been held that a prima facie case does not take away from a defendant the presumption of innocence.

Lawson on Presumptions, Second Edition,
p. 523;

U. S. v. Douglass, 2 Blatchf. (U. S.) 207;

Commonwealth v. Dana, 2 Mete. (Mass.) 329;

Commonwealth v. Kimball, 24 Pick. 373;

State v. Flye, 26 Me. 312;

State v. Tibbetts, 35 Me. 81;

People v. Bodine, 1 Den. (N. Y.) 281.

In the case of *Commonwealth v. Kimball*, 24 Pick 373, and quoted in *Lawson on Presumptions*, 523, et seq., the Court says:

“A prima facie case is that amount of evidence which would be sufficient to counterbalance the general presumption of innocence and warrant a conviction if not controlled by evidence tending to contradict it or render it improbable or to prove other facts inconsistent with it. But the establishment of a prima facie case does not take away from the defendant the presumption of innocence, though it may in the opinion of the jury, be such as to rebut and control it; but that presumption remains, in aid of any other proof offered by the defendant, to rebut the prosecutor’s prima facie case. The court are of the opinion that the jury should have been instructed that the burden of proof was upon the commonwealth to prove the guilt of the defendant,—that he was

presumed to be innocent unless the whole evidence in the case satisfied them that he was guilty."

Assuming that Section 8 of the "Harrison Anti-Narcotic Act" creates a presumption that Section 8 is violated from the mere possession of narcotics, that presumption, in the instant case, was surely rebutted when the defendant took the stand and denied that he was a person required to register; denied that he was an importer, manufacturer, producer, compounder, seller, dealer in, dispenser, or one who gives away the narcotics set forth in the indictment.

The presumption of innocence is evidence in favor of the defendant and is not only evidence of his innocence of one element of the crime but of each and every element of the offense and of the offense itself.

It follows therefore, that under the instructions given by the Court, and the Court's refusal to give those instructions requested by the plaintiff in error that the jury convicted the defendant from the mere fact that he possessed the narcotics without passing upon the other ingredients of the crime as set forth in the indictment.

CONCLUSION.

It is respectfully submitted that for the reasons stated in this brief, to-wit, (1) The insufficiency of

the indictment to charge a crime; (2) The improper joinder of two different crimes against two distinct persons in an indictment consisting of one count; (3) The insufficiency of the evidence to support a conviction; (4) The Court's refusal to properly instruct the jury on questions of law pertaining to the case, the judgment should be reversed.

Dated, San Francisco,
October 17, 1923.

EDWARD A. O'DEA,
Attorney for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUSTAVE JOHNSON,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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Attorneys for Appellee.

No. 4077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUSTAVE JOHNSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE.

This is a writ of error to the United States District Court of the Northern District of California to reverse the sentence of conviction of plaintiff in error for a violation of the "Harrison Narcotic Act."

On March 27, 1923, plaintiff in error, Gustave Johnson, and one Ray Croxall were indicted for a violation of the Harrison Act in an indictment of one count, wherein they were charged as follows:

“did then and there violate a requirement of the Act of December 17, 1914, as amended February 24, 1919, in that they did knowingly, wilfully, unlawfully and feloniously have in their possession a certain preparation and derivative of opium, to wit, one can morphine and one finger stall containing approximately a total of 194 grains of morphine, said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act, and not then and there having paid the special tax provided for by the aforesaid Act on the said morphine.”

The defendant Croxall pleaded guilty and upon trial of the plaintiff in error, who will hereafter be called the defendant, he was convicted as charged and thereupon was sentenced to be imprisoned in the United States Penitentiary at McNeil Island for three years and six months.

At the trial the government showed, among other things, by the testimony of Police Officer Dowell, that on March 23, 1923, two Police Officers of San Francisco accompanied defendant Johnson and Croxall to 882 Fulton Street, San Francisco, where the defendant said he resided, and said it was his place. Apparently the officers were investigating a suspected theft. The premises consisted of two rooms occupied by Croxall, defendant and a woman. The rear room, otherwise called kitchen, was occupied by Croxall. A trunk was found. Defendant

told the officers that the trunk belonged to him. It was found to be locked. The officers tried to open it when defendant Johnson interrupted, "Do not break the trunk, I will give you the key." On opening the trunk in the top drawer the officers found a can and asked defendant Johnson what it was and he said it was morphine and belonged to him. (Trans. of Rec., p. 31.) Upon a further search of a bureau drawer in the front room the officer found a number of needles which Johnson admitted belonged to him and in the rear room they found another morphine can and defendant Johnson admitted that belonged to him, and had contained morphine, and that he had used it, and that he had bought the morphine up north. In the same room that was occupied by Croxall, defendant Johnson told the officer to look on the shelf and that he would find the needle and syringe that is used in taking the shots of morphine. Upon a search, the officer found it as stated. The can was produced and described as being in the same condition as when found, except that a sample was taken for analysis; the can did not have stamps on it of any kind (Trans. of Rec., p. 32). The witness further stated that Johnson did not have the finger stall of morphine on him, that Croxall did. The finger stall was found on Croxall when he was searched at the City Prison. Johnson had requested the officer not to break the trunk open, stated that he had the keys and raised up off the chair and went through his clothes and got the keys and threw them to the

officer, a distance of probably ten feet. (Trans., p. 34 and 35.)

Witness Love, a chemist, identified the exhibit, said he made a chemical analysis of it, and that it contained morphine, and that morphine is a derivative of opium. The can and morphine taken from the trunk were put in evidence.

Witness Frederickson testified that he was present on the occasion mentioned, March 23, 1923, and heard Dowell ask who the trunk belonged to and defendant Johnson said "to me." Witness saw Dowell open the trunk, take the can which was about one-half full, saying, "Why, that is morphine." Thereupon defendant Johnson admitted that it was morphine, and being asked "are you selling this stuff?" he said "I got that for my own use." Being asked how long it would take to use the amount he had left, he said "I am off the stuff now, I only use a very small amount of it; probably it will take six months to a year to use." After a further search the officers found some hypodermic needles not complete. Thereupon Detective Dowell asked defendant Johnson where the remaining portion was and he said, "You will find them under the dish rag in the kitchen"; that was the room occupied by Croxall. The officers found another can in the kitchen. Johnson said that the can belonged to him and that it had contained morphine. There were no stamps on the cans. The cans produced in evidence were described as being in the same condi-

tion as when taken, except that a sample had been taken from the larger of the two cans.

The defendant Johnson in his own behalf testified that he lived at 882 Fulton Street, was addicted to the use of narcotics since 1908, and that he was not a dealer in narcotics; that he was not present when the keys were given to the officers and did not give the keys to them to open the trunk; that he did not own the finger-stall of morphine. He admitted, however, that when the can of morphine was found, the officers said it was morphine, whereupon defendant said he guessed it was; said it belonged to him. After certain other testimony was taken, defendant Gustave Johnson was recalled and testified, "I never imported any narcotics into the country. I never manufactured any narcotics. I never produced any narcotics. I never compounded any narcotics. I never sold any. I never dealt in any narcotics and never dispensed a narcotic. I never gave any narcotics away. I had in my possession certain narcotics. I had them for my own use. I have been addicted to the use of narcotics ever since 1908." At the close of the testimony the defendant moved for a directed verdict on the ground that the evidence was illegally seized, that the indictment did not state a public offense, and that the evidence was insufficient to convict the defendant. The motion was denied.

At the trial the defendant proposed three certain instructions appearing at pages 55 and 56 of the

Transcript of Record. The court refused to give the instructions and the defendant excepted.

Although some seven assignments of error containing various sub-paragraphs were made by the defendant, he now presses but four points in his brief, to wit:

1. No crime is set forth in the indictment.
2. There are two distinct ^{offenses} ~~defenses~~ against two different persons improperly joined in an indictment which consists of only one count.
3. The evidence was insufficient to convict the defendant, and
4. There was error committed in the court's refusal to give certain instructions.

1. THE INDICTMENT WAS SUFFICIENT TO STATE A PUBLIC OFFENSE UNDER SECTION 8 OF THE HARRISON ANTI-NARCOTIC ACT.

The portion of the Act material provides as follows:

“It shall be unlawful for any person not registered under the provisions of this Act and who has not paid the special tax provided for by this Act to have in his possession or under his control any of the aforesaid drugs * * *

The drugs referred to were narcotic drugs, including morphine. The defendant's contention as to

insufficiency of the indictment is based upon the ruling in the case of

Jin Fuey Moy, 241 U. S. 394.

But it is apparent that the pleader in the instant case, having that very case in mind, framed an allegation to cover the element said in the opinion referred to to have been necessary but omitted; that is to say, that the defendants must be shown to have been persons required to register under the provisions of the Act. In the case at bar the indictment contained the express statement:

“Said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid, as amended, being the Act of December 17, 1914, as amended February 24, 1919.”

It was further alleged in the indictment that,

“Said defendants not then and there having registered under the provisions of the said Act, and not then and there having paid the special tax provided for by the aforesaid Act on the said morphine.”

It thus appears that the question here is not the question that was involved in the *Jin Fuey Moy* case. The real contention of the defendant is thus seen to be that the allegation quoted is a nullity, or, as defendant Johnson says at page 11 of his brief,

“The indictment indulges in a bald conclusion of law that he is a person required to register and pay a tax.”

The authorities cited, it is submitted with deference, throw no light upon this question, nor do they sustain the position of plaintiff in error that the averments in question are wholly nugatory or to be disregarded.

It is the contention of the defendant in error here that the allegations so attacked are mixed averments of law and fact and thus sustainable.

In considering the sufficiency of the indictment here it may be useful to note certain canons of construction in regard to indictments which have come to be well established:

- (a) The rules governing criminal pleadings, while no less protective to an accused, have come to be less technical and more practical and decisions rejecting technical objections to an indictment are not now the exception. And this is eminently so from a consideration of the provisions of Section 1025 of the Revised Statutes.

Jelke vs. U. S., 255 Fed. 264, 274.

This authority, on page 274, tersely states the doctrine and cites significant cases bearing upon the point, including a pertinent quotation from the case of

Harper vs. U. S., 170 Fed. 385, 392.

- (b) Defects of form in an indictment are not available on writ of error after verdict.

Section 1025 R. S.

Connors vs. U. S., 158 U. S. 408, 39 L. Ed. 1034.

New York Central etc. Company vs. U. S., 212 U. S. 481, 53 L. Ed. 613, 623.

Armour Packing Company vs. U. S., 209 U. S. 56, 84, 52, L. Ed. 681, 695.

- (c) Upon the whole, an indictment cannot be held to be insufficient if it follows the language of the statute with sufficient description to inform the defendant of the nature of the offense charged and the cause of the accusation, and with such certainty that he could prepare his defense and plead the judgment in bar of any subsequent prosecution for the same offense.

Young vs. U. S., 212 Fed. 967, 968.

- (d) Under the provisions of Section 1025 of the Revised Statutes no defect in an indictment which amounts to a defect of form is available after verdict.

Tested by the provisions of paragraph (c) above quoted, it is seen that the indictment is sufficient and contains sufficient description to inform the defendant of the nature of the offense charged and the cause of the accusation, especially is it such that he could plead his acquittal in the instant case in bar of any subsequent prosecution for the same offense. The defendant Johnson seems to question the latter, but it is manifest that if he were ever prosecuted in the future for the precise possession of contraband drugs complained of, he could defend

by virtue of his former acquittal regardless of the theory or fact under which he would have been required to register. The crime could be easily identified in any future prosecution.

As showing the insufficiency of the allegation in question, the case of

Pendleton vs. U. S., 290 Fed. 388,

is cited. But it is apparent that in that case the court reasoned that the particular averment that the defendant was a practicing physician limited the general statement that he was a person required to register so that the averment amounted to no more than that the defendant was a practicing physician, and the court further held as such he was not required to register unless he dispensed narcotics. The decision is not an authority that the averment made use of here is insufficient. On the other hand, the Circuit Court of Appeals for the Fifth Circuit, in the case of

Miller vs. U. S., 288 Fed. 816, 817,

sustained a count of an indictment which appears to be precisely the same as the case at bar. It was there said:

“As to the fourth count, that was sufficient. It fully charges an unlawful possession of morphine, giving the time and place of such unlawful possession, by one not registered who was a person required to register. *United States vs. Jin Fuey Moy*, 241 U. S. 394.”

In charging statutory crime based upon statutes containing references to situations in other statutes, it is necessary to make terse statements of mixed law and fact at times to plead the statutory connection. Such averments cannot be said to be bald conclusions of law and thus nugatory and worthless. In the case of

Dean vs. U. S., 266 Fed. 695,

where the use in an indictment of the words "original stamped package" was questioned by defendant, this court said:

"When the words are construed with reference to context and other provisions of the law there can be no question of their meaning."

It will be observed that in the case of

Jin Fuey Moy vs. U. S., *supra*,

the Supreme Court in phrasing its holding said that the words "any person not registered" in Section 8 must be taken to refer to the class with which the statute undertakes to deal, *the persons who are required to register by Section 1*. The Supreme Court thus makes use of the words "*persons who are required to register*" by Section 1 as expressive of the omitted element of the indictment.

Accordingly, it cannot be said here that the indictment wholly fails to set forth the element in question; at best it is a mere matter of an uncertainty or imperfection as to form only.

“It is not necessary that an indictment in describing a statutory offense shall use the very words of the statute, as any other form of expression is sufficient which fully describes the evidence.”

Thrope vs. U. S., 276 Fed. 348, 350,

and the Circuit Court of Appeals, in so declaring, cites the cases of

Dunbar vs. U. S., 156 U. S. 185, 191, 39 L. Ed. 390.

Lemon vs. U. S., 164 Fed. 953, 957.

In the case of

Olsen vs. U. S., 287 Fed. 85, 90,

it was declared that an indictment under the statute for using the mails to defraud need not follow the language of the statute, but it is sufficient if the averments bring the charge within the substance and true meaning of the statute; and that every element of the offense which is contained by Section 215, (the section referred to,) was within the phrase of the indictment under review and thus that the failure to plead certain quoted words was a matter of form only.

We conclude, therefore, in the light of the foregoing authorities that the indictment in the instant case contained in some form of statement every element of the charge necessary to be stated.

At best it could only be claimed that the averment

in question is uncertain or too general. But as to such a claim it is submitted that the situation here is not altered on account of the interposition by defendant of what is called a "special" demurrer. It has been held that such a demurrer is no more than a general demurrer in which reasons therefor are stated rather than in a separate brief. The analogy drawn from the special demurrer provided for in civil practice in California and other states is not sound. The so-called special demurrer is not admissible in Federal Criminal practice. If interposed, it is to be considered as a case of general demurrer, in which event the indictment is good if it states in some form the necessary averments.

U. S. vs. French, 57 Fed. 382, 391.

U. S. vs. Patterson, 59 Fed. 280, 281, 284.

This is not to say that a defendant has not a remedy when confronted by an indictment against him containing an averment which is either uncertain or too general. It is well understood that in such a case he has a right to demand a bill of particulars which in a proper case is granted and which gives all the information necessary to prepare for trial. Such a bill of particulars so furnished on his demand effectually limits the general averment in the indictment to the particulars specified. And there is good reason and sound consideration of policy for the distinction here claimed; for if a so-called special demurrer for uncertainty were allowable and, in a given case sustained, it would

nullify the particular indictment and require the entire submission of the case anew to a grand jury, and this although the uncertainty may be comparatively slight. On the other hand, if the defendant be confined in such a contingency to a bill of particulars, he obtains all the information necessary and the government is not put to the expense and delay and possible miscarriage of justice which would result if the indictment were entirely nullified and the cause submitted anew to the grand jury.

In Federal procedure it has been repeatedly held that the proper remedy is for the defendant to demand a bill of particulars. Thus in the case of

Dean vs. U. S., 266 Fed. 695, 696,

this court said of the case there:

“When the words are construed with reference to context and other provisions of the law there can be no question of their meaning. *If they seemed obscure or indefinite to the plaintiff in error, he had his remedy in the court below by demanding a bill of particulars.*”

And in the case of

Wilson vs. U. S., 275 Fed. 307, 310,

it was decided that if an indictment fails to apprise defendants of the nature of the accusation with that degree of certainty to which they are entitled, they had a right to ask for a bill of particulars. And cases are cited illustrating Federal Practice in that regard.

In the case of

Dierkes vs. U. S., 274 Fed. 75, 79,

it is said:

“That there is in the courts of the United States a well settled practice of requiring and giving bill of particulars in criminal cases, for the purpose of informing a defendant with respect to time, place and other details, and thus to enable him to meet the charge appears by these further citations;” (the court thereupon citing cases from the Supreme and other Federal courts).

It was further declared in the same case that a bill of particulars once made and served concludes the rights of the parties and that he who has furnished the bill must be confined to the particulars specified as closely and effectually as if they constituted essential allegations in a special declaration. It is true that such a bill will not cure a fatal defect in an indictment, but here we have an averment in question in a terse and clear form, and the only criticism that can be seriously made to it is that it is too uncertain or too general.

The defendant in the instant case could have moved for a bill of particulars, but he did not do so. It is, therefore, submitted that after verdict in view of the provisions of Section 1025 of the Revised Statutes and of the provisions of Section 269 of the Judicial Code, as amended February 26, 1919, the indictment in the present case must be held sufficient to support the conviction.

2. BUT ONE OFFENSE WAS CHARGED IN THE INDICTMENT; IT WAS PROPERLY CHARGED AGAINST TWO PERSONS.

In the indictment it is specifically charged that the *defendants*, etc., did have in their possession a certain preparation and derivative of opium, to wit, one can morphine and one finger-stall containing approximately a total of 194 grains of morphine. There was thus a single charge of a single possession. The count was not rendered duplicitous merely from including in the description two or more items. The two items would constitute a single possession, since it was alleged that the possession of the defendants was at the same time and place. The defendant would have more ground to complain had the pleader adopted the contrary plan and charged the possession of the can in one count and the finger-stall in another; such pleading would have been improper.

Braden vs. U. S., 27 Fed. 441.

Nor is it significant, nor was it erroneous for the jury to find the defendant Johnson "guilty as charged," even if it were conceded that he did not have possession of all of the drugs mentioned in the indictment. He was shown to have possession of sufficient of the drugs to constitute the commission of the crime charged and thus he was properly so convicted. Counsel would not contend that if one were prosecuted for, say, larceny of a given amount

of money and it appeared that the defendant was guilty as to sufficient value as to make it larceny, but less than the amount charged, the defendant would be entitled to an acquittal or that the proper verdict would not be "guilty as charged."

Nor was it a defect in the indictment, rendering the count duplicitous for the charge to run against the two defendants Johnson and Croxall. It was possible for a joint possession. Since all persons concerned are to be charged as principals, it is very easy to conceive a situation where two defendants could be shown to be in possession of a given article. The case cited on this point by counsel,

U. S. vs. Deitrich, 126 Fed. 671,

presented a wholly different situation; it expressly appeared from the indictment in that case that one of the defendants was a *bribe-giver* and the other a *bribe-taker*, thus affirmatively showing that each one was charged with a crime different from the crime charged against the other. There is no such situation here.

3. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICT.

There was a complete and perfect case made out against the defendant by the Government. It proved without conflict or controversy that on March 23, 1923, at San Francisco, the defendant had in his possession a can of morphine. He admitted the

possession and the ownership and admitted it at the time of the trial and does not now dispute it. It was also established that the can was not stamped as showing a tax paid.

The defendant was thus shown to have had in his possession one of the contraband drugs; accordingly, there arose the presumption of his violation of Section 8 of the Harrison Narcotic Act and also of a violation of Section 1 thereof. It is provided in Section 8 of the Act, Section 5459 Barnes Code, as follows:

“It shall be unlawful for any person not registered under the provisions of this Act and who has not paid the special tax provided for by this Act to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this Section and also of a violation of the provisions of Section 1 of this Act.”

It thus appears that when the Government proved that defendant Johnson had possession of the can of morphine, it also submitted presumptive evidence of a violation of Section 8 under which the defendant was charged, as well as a violation of the provisions of Section 1 of the Act, that is to say, that the defendant, being a person required by the provisions of Section 1 to register with the Collector and pay the special tax, did not in fact register or pay the tax and, nevertheless, had possession of the contraband drugs.

Counsel for defendant Johnson does not submit any argument as to this phase of the statute further than to refer to the presumption as the "questionable presumption" set forth in Section 8 of the Act, etc. But statutory provisions of this character are not new and have been fully sustained. Such legislation is entirely valid and is to be given effect.

Luria vs. U. S., 231 U. S. 9, 58 L. Ed. 101.

Dean vs. U. S., 266 Fed. 694.

Gee Woe vs. U. S., 250 Fed. 428.

Baender vs. U. S., 260 Fed. 832.

Pierriero vs. U. S., 271 Fed. 912, 913.

The Pierriero case and the Dean case involved the "Harrison Narcotic Act" and the provisions of that Act making one fact *prima facie* evidence of another.

Nor is it significant that the defendant took the stand and denied in whole or in part that he was in any activity requiring registration. There would thus be presented merely a question for the jury. They were entitled to weigh his statement in light of the facts and reject it and accept the presumption if they were satisfied as to the truth of the latter. If the effect of similar presumptions could be wholly removed from a case by a mere denial on the part of an accused, they would be of little value. The true rule is that such evidence of the accused merely makes a conflict in the evidence.

4. THE INSTRUCTIONS PROPOSED BY DEFENDANT WERE INCORRECT AS STATEMENTS OF THE LAW AND PROPERLY REFUSED.

Complaint is made of the action of the court below in refusing to give three several instructions proposed by the defendant. It is very clear, however, that not one of the instructions so proposed was a correct statement of the law and thus that the court properly refused the same. A detailed consideration of the instructions so proposed will make this manifest.

Thus the first instruction so proposed, appearing at the bottom of page 55 of the Transcript of Record, was as follows:

“You are instructed that there is no presumption of law created in the Act of December 17, 1914, as amended February 24, 1919, which is superior to or overcomes the presumption of innocence with which the defendant is clothed from the time of his arrest to the end of the jury’s deliberations.”

The court had already instructed the jury properly on the question of the presumption of innocence as appears from page 54 of the Transcript of Record. But the defendant sought to have the court tell the jury in effect that the presumption of innocence was superior to and displaced the presumption or rule of evidence created in Section 8 of the Act quoted.

In that section it was declared that the fact of possession

“shall be presumptive evidence”

of a violation of the section. As we have seen from the cases cited, this was a valid enactment and it was intended by Congress that the proof of the fact of possession to the jury's satisfaction would also operate as proof of the other facts and thus *displace* or overcome the presumption of innocence. Just as the presumption of innocence is to yield to proof, so is it to yield here to the proof of possession, both as to the fact of possession and as to the facts as to which the possession was stated to be presumptive evidence. If the law were as the court was asked to instruct the jury, the presumption declared in the Act could have been given no effect whatsoever, and the court would be obliged to instruct that the presumption in question, being overcome by the presumption of innocence, was to be disregarded and thus that the defendant be acquitted. Such an ~~instruction~~ instruction is thus shown to be absurd.

The Fourth instruction proposed by the defendant, appearing at page 56 of the Transcript of Record, is similarly an incorrect statement of the law. Under Section 8 of the statute it was unlawful for the defendant to have possession of the narcotics, he being a person required to register, unless he had *both registered and paid* the special tax provided for by the Act. He must have done both to justify his possession, yet according to the instruction pro-

posed, he need have done but one of the two things. The jury were to be told in the sentence at the end of the instruction that unless it was established that the defendant had not paid the tax it was their duty to acquit. They were to be told in the previous sentence, substantially, that unless it were established that the defendant was required to register and failed to register he was to be acquitted. In other words, the proposed instruction meant that even if it were established that the defendant was a person required to register he was, nevertheless, entitled to be acquitted, unless it be further established that he did not register, while under the law such registration would not have constituted a defense unless he also had paid the tax. The defendant thus requested an instruction upon the whole case and failed to include the necessary elements. A reading of the instructions discloses that he adopted the theory that if there was a failure to establish either the non-registration or the non-payment of the tax he was entitled to an acquittal, while as a matter of fact the statute required him to do both if he were a person required to register.

The remaining instruction proposed by the defendant, appearing at the top of page 55 of the Transcript of Record, was also erroneous in that it was an instruction for a verdict upon the whole case and did not include all of the necessary elements or make provision for all possible conditions.

The original Act in question, approved December

17, 1914, appears at Volume 38 of the Statutes, page 785. Section 1 of that Act was substantially amended February 24, 1919, as appears from Volume 40 of the Statutes, page 1130. The section has since been re-enacted, but without any change. The section as it now exists, provides for a certain registration and declares that

“Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses or gives away opium or coca leaves, or any compound, salt, derivative or preparation thereof shall register,” etc.

In the next following paragraph of the section the significant phrase is made use of

“Is *engaged* in any of the *activities* above enumerated.”

The phrase “engages in any of such activities” is thereafter repeated a couple of times. In a subsequent paragraph of the same section, in referring to the exemption of certain officials, use is made of the phrase “engaged in any of the businesses herein described shall not be required to register.” In describing who shall be deemed a wholesale dealer, it is said that any person who “sells” or “offers for sale” any of said drugs. It is thus generally provided that any person who engaged in any of such activities is immediately required to register, and it is further significant that Section 8 is violated by any of such persons having possession of the drugs who has failed to register.

Accordingly, when a situation arises that any person is engaged in any of the said activities, that is to say, holds himself out to do any of the said things, or if any person has possession of the said drugs with intent to do anything of the things mentioned, although he may not as yet have sold, given away, dispensed or produced any of the said drugs, is, nevertheless, required to register.

Wherefore, we submit that it is clear that the obligation to register is not necessarily limited to persons who have at a past time either imported, produced, sold, dispensed or given away the said drugs, but it also required that any person who engaged in any of the said activities or holds himself out as ready to do so, or has made preparation, or has in his possession any of the drugs with intent to do so, is required to register, and thus within the provisions of Section 8 of the Statute here involved.

Turning to the instruction proposed, it is apparent that the substantial part of the proposal is couched in the past tense. The court was asked to tell the jury that if the defendant did not do the said things he was not required to register. Literally the language is not equivalent to the one in the Statute, for there it is provided that

“Every person who”

does one of the things, using the present tense, the language being appropriate to govern the case of a doing of business, or engaging in the said activity,

while the language of the instruction would only apply to a past act which might have been of an isolated character. The government was entitled to have the jury pass on the question as to whether the defendant was not in fact carrying on such calling or activity, although it might not have been able to definitely prove any single particular act in that respect as having already been done.

Thus in the case of

Gee Woe vs. U. S., 250 Fed. 428, 430,

occurs the significant declaration:

“The defendant might be shown to be a dealer either by evidence of sales made by him or by evidence tending to show that he held himself out as engaging in the business of dispensing the drug. His being a dealer might well have been inferred from his suspicious conduct and from his receiving visitors at unreasonable hours, and the character of his premises and their occupants, though the jury were unconvinced that the particular sale relied upon by the government to sustain the second count of the indictment was in fact made. If the defendant was a dealer, the burden was upon him to show registry and payment of the special tax.”

It thus appears that here, although the government might not be able to show that at a past time the defendant had sold or given them away, it had the right to have the jury infer that he held himself

out as ready to do so or, in other words, had engaged in the said activity.

The further call in the said instruction as to whether the defendant was merely a consumer, a user, or an addict to the use of narcotics, and had the narcotics in his possession for his own use would be an objectionable statement as in part argumentative and misleading. That a defendant is an addict is not a defense. An addict may engage in any of the said activities, as well as any other person, and in fact an addict is quite frequently a peddler.

We submit that a fair reading of the proposed instruction in the light of the quoted provisions of Section 1 of the Statute as that section now exists would show that the instruction proposed, being to some extent misleading, would have induced the jury to believe that the past failure of the defendant to do any of the things mentioned would have operated as a defense while, as we have seen, it is clear that the obligation to register comes before the doing of any of the said things and binds one who goes into any of the said activities in advance of his doing business.

An instruction of the type involved compelling an acquittal under certain circumstances should make provision for all contingencies. It is quite to be inferred from the testimony given that defendant Johnson stood ready to dispense or give away the drugs in his possession to his roommate Croxall, who was also an addict. The defendant had a sub-

stantial quantity of the prohibitive drugs and under the rule of evidence stated in the statute the jury had the right to infer from his possession that he at least stood ready to sell or dispense a portion of the same.

It is, therefore, respectfully submitted that the defendant had a fair trial in the court below, and that his conviction is free from error, that the indictment states an offense, that the case was proven, and that his sentence should, therefore, be affirmed.

Respectfully submitted,

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